No. 96236

IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH, *et al.*,	)	
Plaintiffs-Appellees,	)	On Direct Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
v.	)	
PHILIP MORRIS INCORPORATED,	)	No. 00 L 112
Defendant-Appellant.	)	Nicholas G. Byron, *Judge Presiding.*

OPENING BRIEF OF APPELLANT PHILIP MORRIS USA INC.

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Dated: December 10, 2003

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

This is an appeal from a $10.1 billion judgment against Philip Morris USA Inc. ("PM USA"), formerly known as Philip Morris Incorporated, in a class action tried under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"), 815 ILCS 505/1 *et seq.*, and the Unfair Deceptive Trade Practices Act ("UDTPA"), 815 ILCS 510/1 *et seq.* Plaintiffs alleged that all purchasers of Marlboro Lights and Cambridge Lights (together, "Lights") were deceived by the words "lights" and "lowered tar and nicotine" into believing that those cigarettes delivered less tar and nicotine, and were therefore less hazardous, than their full flavor counterparts. Plaintiffs disavowed recovery for personal injuries and sought instead "economic" damages in the form of a 92.3% refund of the cigarettes' purchase price. Over PM USA's objection, the circuit court certified a class consisting of an estimated 1.14 million consumers from anywhere in the world who purchased Lights in Illinois over a 30-year period, between 1971 and February 8, 2001. After a bench trial, the trial judge awarded $7.1 billion in compensatory damages to the class (including over $2 billion in prejudgment interest and almost $5 billion for sales outside the three-year limitations period). The court then imposed an additional $3 billion in punitive damages.

PM USA seeks reversal of the judgment primarily on four grounds: (1) the circuit court improperly certified the class and deprived PM USA of due process; (2) plaintiffs' claims are barred by §§ 2 and 10b of the CFA, the doctrine of federal preemption, and the First Amendment, given the federal government's comprehensive scheme governing cigarette labeling, advertising, and tar and nicotine disclosures; (3) plaintiffs failed to establish liability under the CFA for any class member, including the class representatives; and (4) the $10.1 billion damage award lacked any legal or factual basis. No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the circuit court committed legal error, abused its discretion, and deprived PM USA of due process by certifying and trying this case as a class action.

2. Whether plaintiffs' claims are barred as a matter of law by §§ 2 and 10b of the CFA, federal preemption, and the First Amendment, given the comprehensive federal regulatory scheme governing labeling, advertising, and tar and nicotine disclosures.

3. Whether the judgment in favor of the class representatives and the class should be reversed because it is against the manifest weight of the evidence.

4. Whether the $10.1 billion damages award is based on errors of law and fact.

JURISDICTION

PM USA appeals from the final judgment entered March 21, 2003, in favor of the class. C. 43425-28. PM USA filed a timely notice of appeal on May 12, 2003, after its post-judgment motion was denied on April 24, 2003, and plaintiffs' post-judgment motion was denied on May 9, 2003. C. 45749; C. 46111-13. This Court granted a direct appeal on September 16, 2003, and has jurisdiction under Supreme Court Rules 303 and 302(b).

STATUTES INVOLVED

This appeal involves construction of the CFA, 815 ILCS 505/1 *et seq.*; the UDPTA, 815 ILCS 505/10 *et seq.*; the class action statute, 735 ILCS 5/2-801 *et seq.*; the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 41 *et seq.*; and the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), 15 U.S.C. § 1331 *et seq.* The pertinent portions of these statutes are reproduced in the Separate Appendix.

STATEMENT OF FACTS

Background

For the last 35 years, the Federal Trade Commission ("FTC") has endorsed a standardized testing method based on smoking machines (the "FTC Method") to provide a

consistent benchmark for comparing tar and nicotine yields of different brands of cigarettes. *See, e.g.*, Group 8(22).[1] As described in greater detail below, the FTC's policy has been to require cigarette manufacturers to report tar and nicotine yields based on the FTC Method. As part of that policy, the FTC has allowed cigarette manufacturers to use terms such as "lights" and "lowered tar and nicotine" so long as they are substantiated by the FTC Method and have yields of 15 milligrams of tar or less according to the FTC Method. *See, e.g.*, Group 14(3); Group 16(5); Group 9(9); Group 13(4). From the beginning, the FTC has recognized that neither its method nor any other standardized test method can accurately predict how much tar and nicotine any individual smoker will receive. *See, e.g.*, Group 8(22) at 1-2. This is because individuals smoke cigarettes differently. Smokers who inhale more deeply, inhale more often, or cover the holes that ventilate cigarettes engage in behavior known as compensation and may obtain as much tar and nicotine from a light cigarette as from a full flavor cigarette. *See, e.g.*, *id.* at 2; PX 14 at 39 (defining compensation).

Lights have always been labeled and advertised in accordance with federal law. Every PM USA Lights advertisement included tar and nicotine yields as determined by the FTC Method and a statement expressly attributing those yields to the FTC Method. *See, e.g.*, Group 9(15); Group 19(4) at App. C. As required by federal law, Lights have always carried the same Surgeon General's warnings as full flavor cigarettes. 15 U.S.C. § 1333; Group 41(1) at 476. PM USA never advertised Lights as less hazardous than any other cigarette or claimed that the FTC Method tar and nicotine yields reflected actual delivery to the individual smoker. R. 10015, 9994-95 (PM USA's witness Lund).

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[1] "Group" refers to defense exhibits that were admitted into evidence as part of a collection. "DX" refers to all other defense exhibits (labeled "MIPM" below). "PX" refers to plaintiffs' exhibits. Citations to the Separate Appendix are to "A. __."

The Complaint

Plaintiffs filed their initial complaint in the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, on February 10, 2000, asserting CFA and unjust enrichment claims on behalf of a purported class of Illinois residents who purchased Lights in Illinois since the introduction of Marlboro Lights in 1971. C. 3-22. Plaintiffs alleged that the word "lights" (which appeared on both Marlboro Lights and Cambridge Lights) and the phrase "lowered tar and nicotine" (which appeared only on packs of Marlboro Lights) were deceptive. C. 10-12. According to plaintiffs, these terms led each consumer to believe that he or she would receive lower tar and nicotine and that smoking Lights would therefore be less hazardous than smoking full flavor cigarettes. C. 14-15. Plaintiffs further alleged that PM USA had designed Lights "to deliver lowered tar and nicotine levels" when tested by the FTC Method while knowing that Lights would not deliver less tar and nicotine – and therefore would not be any less hazardous – than full flavor cigarettes. C. 11. Plaintiffs also alleged that Lights were "more genotoxic (causing genetic and chromosomal damage) per milligram of tar than 'regular' cigarettes." C. 5. Finally, plaintiffs alleged that all class members purchased Lights because of a belief that they were less hazardous and that no one would have purchased Lights "but for Defendant's unfair and/or deceptive acts and/or practices." C. 12. Plaintiffs sought recovery for economic loss. C. 13, 15.

Certification of the Class

Plaintiffs moved for class certification on September 8, 2000. C. 205-20. PM USA argued that plaintiffs failed to satisfy the requirements of the class action statute because, among other things, individual questions of fact predominated over any common issues. C. 791-802. Based on expert and other evidence, PM USA asserted that plaintiffs' claims raised a host of factual issues that could be decided only by examining each class member's individual smoking behavior, knowledge and beliefs concerning Lights, and reasons for buying Lights. C. 791-817.

For example:

- *Whether each consumer was deceived because he or she believed that Lights would deliver less tar and nicotine and be less hazardous is an individual issue.* Polls and surveys show that a majority of smokers did not believe that Lights are any safer than full flavor cigarettes and therefore were not deceived. *See* Group 41(1) at 183, 185, 189-94.

- *Whether each consumer was deceived because he or she in fact failed to get what was supposedly promised – less tar and nicotine – is an individual issue.* Studies show that light cigarettes do in fact deliver lower tar and nicotine to many smokers; those smokers who received less tar and nicotine from Lights were not deceived and did not suffer injury. *See, e.g.*, C. 805-08; C. 43217-20.

- *Whether any alleged deception proximately caused each consumer to purchase Lights and suffer actual damage is an individual issue.* Surveys demonstrate that many consumers choose to smoke light cigarettes for reasons, such as taste or popularity, that have nothing to do with tar and nicotine yields or health concerns. *See, e.g.*, DX 3824 at 13, 15. In addition, despite claiming that they would not have bought Lights had they known about the alleged deception, the two original class representatives continued to purchase Lights even after filing this lawsuit. *See* R. 7917 (Miles); R. 7175 (McHatton).

Plaintiffs submitted no expert testimony, but simply argued that these individual issues were irrelevant to their claims. For example, plaintiffs argued that the CFA did not require proof that consumers were deceived or that they purchased Lights because of the alleged deception. R. 28. On February 8, 2001, the court certified the class, agreeing with plaintiffs that class members' reasons for purchasing Lights were irrelevant: "The Court does not believe that the issue of causation requires a determination as to why each class member smoked light cigarettes." C. 1739. The court approved the two class representatives, Susan Miles and Linda McHatton. *Id.* The court later approved the addition of three class representatives, Christino Whitt, Sharon Price, and Michael Fruth. C. 15459.

The class as originally certified was limited to Illinois residents who did not have a claim for personal injury. C. 1739–42. Plaintiffs persuaded the circuit court to "preserve[]" class members' rights to bring future personal injury claims. C. 1740. Subsequently, plaintiffs convinced the court to expand the class definition to include everyone in the world who

purchased Lights in Illinois over the course of 30 years, including people with personal injury claims. C. 12030. The "preserv[ation]" of personal injury claims remained in effect. *Id.*

In June 2002, this Court issued its opinion in *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134 (2002). PM USA moved to decertify the class, arguing that *Oliveira* made clear that the circuit court's conclusion that plaintiffs were not required to prove deception and causation for each class member was erroneous. C. 14366-428. The circuit court denied the motion, holding that its prior ruling "still is valid, and is not overcome by *Oliveira*." R. 1079.[2]

With respect to class notice, PM USA requested that, where possible, the circuit court require plaintiffs to provide absent members with individual notice. PM USA offered to produce from its own database a list of names and addresses of Lights smokers in Illinois. Plaintiffs' counsel opposed individual notice because, among other things, such notice might lead some class members to "opt out" and PM USA could then make "contact with these opt out people" to help defend against plaintiffs' claims. R. 1223. The circuit court refused to require individual notice and instead ordered only notice by publication. C. 12981; C. 12966-69. No one opted out.

PM USA also sought pretrial discovery from absent class members in order to illustrate the individual differences among class members and to challenge plaintiffs' class-wide liability and damage theories. C. 17569-650. The circuit court refused to allow such discovery. R. 1215. Less than three months before trial, plaintiffs identified 21 additional class members who they "may or may not call . . . at trial on the subject of their personal experience smoking light cigarettes." C. 42162-63; C. 42167-69. PM USA renewed its motion for absent class member discovery on the ground that it would be unfair to limit evidence to the few class members

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[2] In addressing the motion, the circuit court questioned whether *Oliveira* had been properly decided: "[T]he elements enumerated in *Oliveira* I didn't see in *Zekman*, and I certainly don't see in the Act." R. 1076.

handpicked by plaintiffs' counsel. C. 26557-63. The court denied PM USA's motion, allowing depositions only of those absent class members identified by plaintiffs' counsel. C. 26616.

PM USA's Motion For Summary Judgment Based On The Federal Regulatory Scheme

Before trial, PM USA moved for summary judgment under CPA § 10b and the doctrine of federal preemption based on the comprehensive federal regulatory scheme relating to labeling, advertising, and tar and nicotine disclosures. C. 5546-634. PM USA argued that Congress in the Labeling Act had specified the warnings that cigarette manufacturers must give consumers and had expressly prohibited states from requiring additional disclosures. C. 5565-67, 5578-604. PM USA also argued that the FTC had adopted the FTC Method to measure tar and nicotine yields and had allowed and encouraged manufacturers to use descriptive terms such as "lowered tar and nicotine" and "lights," so long as those terms were substantiated by the FTC Method. Any inconsistent state-law duty would conflict with the FTC's policies regarding tar and nicotine disclosures. C. 5567-71, 5604-33. In response, plaintiffs effectively conceded that any claims based on a failure to warn would be expressly preempted, abandoning all omission, concealment, failure to disclose, and failure to warn claims, as well as any claim that PM USA had deceived the FTC. *See* C. 17123-255; *see also* C. 17942-43, 17951-57; C. 20753. Plaintiffs thus limited their case "exclusively" to allegations based on PM USA's statements that "its products . . . were 'light' and 'lowered tar' versions of their respective 'parent' brands." C. 17143-44. PM USA maintained that these remaining allegations were barred. C. 05619-25.

The circuit court denied PM USA's motion for summary judgment with respect to plaintiffs' abandoned claims, ruling that it would be "inappropriate for the Court to rule on claims that are no longer in the case." C. 20753. With respect to the remaining claims, the court concluded that it would be "premature" to address PM USA's defenses because there were "significant disputes about several material facts" that would require live testimony. C. 20754. The court never identified those disputes.

Trial

Trial began on January 21, 2003. That morning, plaintiffs withdrew their unjust enrichment claim, which plaintiffs contended was the only claim that provided a right to trial by jury. R. 1915. Trial proceeded on plaintiffs' CFA claim without a jury. Plaintiffs called Price, Fruth, four other class members, and 12 expert witnesses to testify. On the last day of their case-in-chief, plaintiffs withdrew three of the five class representatives (Miles, McHatton, and Whitt), leaving Price and Fruth to represent the class. C. 42443; R. 6240. PM USA offered the deposition testimony of 18 class members (Price, the three withdrawn representatives, and 14 other class members identified in plaintiffs' interrogatories) and called seven expert witnesses. In rebuttal, plaintiffs recalled two of their experts and called two new experts.

Marlboro Lights And Cambridge Lights

PM USA began selling Marlboro Lights in 1971 and Cambridge Lights in 1986. R. 6796 (Morgan); R. 7253-54 (Dudreck). Lights have always had lower FTC Method yields than their full flavor counterparts. R. 6490 (PM USA's expert Peterman). Currently, Marlboro Lights and Cambridge Lights have FTC Method tar yields of 9-11 mg and 10-11 mg respectively versus 15-16 mg for Marlboro and 16 mg for Cambridge. *See, e.g.*, Group 9(45) at 5-6, 16-17. These facts were undisputed.

Class Members' Testimony

All of the class members who testified at trial were handpicked by plaintiffs' counsel. Nevertheless, their testimony revealed major differences in class members' beliefs about Lights, reasons for purchasing Lights, and smoking behavior.

Class Representative Sharon Price. In 1966, Sharon Price began smoking Viceroys, a full flavor cigarette manufactured by Brown & Williamson. R. 5705. In 1977, after "check[ing] the tar and nicotine numbers" measured and reported by the FTC, she switched to Viceroy Lights. R. 5688-89, 5706. Nine years later, Price switched to Cambridge Lights. R. 5711-14. She

testified that there were "three factors" in her decision to switch: cost, taste, and the fact that the FTC Method results for Cambridge Lights were similar to those of Viceroy Lights. R. 5715.

In the "spring of 2002," Price heard a news report "that light cigarettes were not truly lower in tar and nicotine." R. 5698. By the fall of that year, she had concluded that light cigarettes were "not truly light," but she kept buying and smoking Cambridge Lights, even during trial. R. 5718-19; Group 43(3) at No. 13. She liked the taste of Cambridge Lights, enjoyed smoking them, R. 11582-83, and – despite suing PM USA – saw "no reason to change." R. 5731. Price did not know whether she changed her smoking behavior in any way after switching to light cigarettes. Group 42(4) at Nos. 1, 5, 7, 11, 13, 17, 19, 23, 25, 29, 31, 35, 37, 41, 43, 47. She also did not know whether she failed to receive lower tar and nicotine from smoking Cambridge Lights. R. 5715.

Class Representative Michael Fruth. Michael Fruth became a "regular smoker" in 1973, smoking non-PM USA brands. R. 3369-70. In 1982, Fruth switched to R.J. Reynolds' Salem Lights because they were on sale. R. 3372. In 1985, he switched to Marlboro Lights Menthols, again because of a sale. R. 3373, 3375. In 1990, Fruth switched to Marlboro Lights "to get away from the menthol." R. 3374-76.

In February 2001, Fruth saw a *60 Minutes II* program in which two of plaintiffs' experts asserted that light cigarettes were no safer than full flavor cigarettes and were possibly more dangerous. R. 3381, 3414. At that point, Fruth no longer believed that light cigarettes were safer than full flavor cigarettes, R. 3381-82, 3414, but he continued to smoke Marlboro Lights for the next two years anyway. R. 3383-84, 3399, 3409-10; Group 43(5) at No. 13. Four days before he testified at trial, Fruth switched to full flavor Camels; he said he did so because he had heard one of plaintiffs' witnesses testify that Lights were more harmful than full flavor cigarettes. R. 3410.

Like Price, Fruth did not know whether he changed his smoking behavior in any way after switching to light cigarettes. R. 10328-35; Group 42(5) at Nos. 7, 9, 13, 15, 19, 21, 25, 27,

31, 33, 37, 39, 43, 45. He also did not know whether he in fact failed to receive lower tar and nicotine from Marlboro Lights. R. 3394-95, 3397-98, 3407; Group 42(5) at No. 1.

Other Class Members. The testimony of other class members revealed that:

- Out of 23 class members who testified (including class representatives), 17 continued to smoke light cigarettes despite having learned of the alleged deception.[3]

- No class member could say that he or she in fact failed to receive lower tar and nicotine from smoking Lights.[4] Some testifying class members admitted that they may have received lower tar and nicotine[5] and some conceded that they did not change their smoking behavior when smoking Lights.[6]

- Many of the testifying class members chose Lights for reasons other than perceived safety. For example, Ms. Miles – one of the withdrawn class representatives – chose Cambridge Lights because she "preferred the flavor." R. 7917.[7] She explained that she never "consider[ed] buying a non-light cigarette" because she "didn't like the flavor. Too strong." R. 7916.

Expert Testimony

As described above, plaintiffs asserted during the class certification proceedings that they were not required to prove deception, causation, and injury for each – or, indeed, any – class member. *See supra* at p.5. At trial, plaintiffs reversed their position and purported to prove each

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[3] *See* R. 3284 (Kezios); R. 4528-30 (Izzi); R. 10285 (McHatton); R. 7201-02 (Anderson); R. 7304 (Webb); R. 7917 (Miles); R. 10027 (Smith); R. 10075 (M. Norton); R. 10161, 10181-82 (P. Gebhart); R. 10297, 10302 (Bohm); R. 10344 (Seitzinger); R. 10448 (Reynolds); R. 10869 (G. Gebhart); R. 10937, 10956-58 (Holak); R. 10984 (Whitt); R. 11618-21 (J. Norton); R. 5718-19 (Price); *but see* R. 11475 (Walker) (gradually quit); R. 10409 (Crain) (switched to ultra-lights). One of these 17 class members switched from Marlboro Lights to a different light brand. R. 10448-51 (Reynolds). Two of the 17 had switched to a different light brand before learning of the alleged deception and continued to smoke those light cigarettes thereafter. R. 0863-70 (G. Gebhart); R. 10159, 10181 (P. Gebhart). Although all testifying class members asserted that they had bought Lights at least initially believing those cigarettes were less hazardous, they gave this testimony after watching a *60 Minutes II* program in which several plaintiffs' experts expressed their views on light cigarettes and the alleged deception. *See, e.g.*, R. 3381 (Fruth); R. 10059-60 (Smith); R. 10362, 10380 (Seitzinger); R. 10879 (G. Gebhart).

[4] *See, e.g.*, R. 7230-31 (Anderson); R. 7314-16 (Webb); R. 10387 (Seitzinger); R. 10452 (Reynolds).

[5] *See, e.g.*, R. 10996 (Whitt); R. 10452 (Reynolds).

[6] R. 7307, 7322 (Webb); R. 10859 (G. Gebhart); R. 10115 (Norton).

[7] *See also, e.g.*, R. 7169 (McHatton) (Marlboro Lights had "lighter taste," was "not as harsh," and "was a smoother cigarette").

of these elements on a class-wide basis through expert testimony. Yet, plaintiffs' experts never spoke to, tested, or examined a single member of the class.[8] None offered a scientific opinion about any individual class member. Nevertheless, plaintiffs' experts offered "class-wide" testimony on the following subjects:

Whether Consumers Receive Lower Tar And Nicotine. Plaintiffs introduced the testimony of Dr. Neil Benowitz in an effort to prove that class members did not receive lower tar and nicotine. Dr. Benowitz testified that the amount of tar and nicotine that a smoker actually inhales depends upon how the individual smokes his or her cigarette. R. 3057-58. For example, smokers can increase delivery of tar and nicotine by inhaling more frequently or deeply, covering ventilation holes, or smoking the cigarette further down the rod. R. 3057-59, 3048. Dr. Benowitz further testified that, to obtain a certain daily dosage of nicotine, people who smoke light cigarettes "compensate" – *i.e.*, they smoke more intensely or increase the number of cigarettes smoked per day to obtain the same amount of nicotine, regardless of the brand smoked. R. 3058-59. He explained that a person who completely compensates when smoking Lights obtains the same amount of tar and nicotine that he or she would from their full flavor counterparts. R. 3058-62, 3070. Dr. Benowitz opined that compensation on "average" was complete. R. 3103. Nevertheless, he acknowledged that for any particular person compensation may be incomplete, or even non-existent: "some people take in less and some people take in more" tar and nicotine when smoking Lights. *Id.* Dr. Benowitz admitted that the only way to determine whether a particular class member failed to receive lower tar and nicotine would be to perform a "biomarker" test to determine nicotine content in blood – a test that neither he nor any of plaintiffs' other experts had conducted for any class member. R. 3105, 3260.

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[8] *See, e.g.*, R. 874-75 (Farone); R. 3097-99 (Benowitz); R. 3707 (Cummings); R. 4323-24 (Burns); R. 4803-05 (Cohen); R. 5038-39, 5408 (Cialdini); R. 5240, 6093 (Harris); R. 5585-86 (Dennis) (plaintiffs' survey not a survey of class members).

Whether Light Cigarettes Are More Dangerous. Plaintiffs also sought to prove that the tar from Lights was more dangerous than the tar from full flavor cigarettes. Three of plaintiffs' witnesses – Drs. Peter Shields, William Farone, and Jeffrey Harris – testified that a milligram of tar from Lights is more mutagenic (*i.e.*, it produces more mutations in bacterial cells in the laboratory) and has higher levels of some carcinogens than a milligram of tar from a full flavor cigarette. *See, e.g.*, R. 5330 (Shields); R. 2313 (Farone); R. 5164 (Harris). All three experts agreed, however, that the evidence did not demonstrate, under the "standards that scientists would use," that "smoking Marlboro Lights is more dangerous than smoking Marlboros." R. 5193 (Harris); *see also* R. 10298-99, 12121-22 (Farone); R. 5503-05 (Shields).

What Consumers Believe. Plaintiffs offered three witnesses – Drs. Joel Cohen, Robert Cialdini, and K. Michael Cummings – in an attempt to prove that all consumers believed that Lights are less hazardous and that this universal belief resulted from PM USA's use of the terms "lights" and "lowered tar and nicotine." *See, e.g.*, R. 4653, 4696-703 (Cohen); R. 4921 (Cialdini); R. 3574-75, 3580, 3599.1 (Cummings). On cross examination, all three experts admitted that they did not know of any survey indicating that all light cigarette smokers believed that lights are less hazardous. R. 4804, 4830 (Cohen); R. 5031-36 (Cialdini); R. 3774-83 (Cummings). In fact, they all admitted that every survey they had seen conflicted with their testimony and that most of the surveys found that less than 50% of the respondents believed that lights are less hazardous. *See, e.g.*, R. 4804, 4830 (Cohen); R. 5059-60 (Cialdini); R. 3774, 3781 (Cummings). Relying on such surveys, PM USA's expert, Dr. Kip Viscusi, opined that consumers have widely differing beliefs about light cigarettes – some consumers believe they are less hazardous, and some do not. R. 11145-61; *see also* R. 6967-77 (PM USA's expert Meyer).

Why Consumers Buy Lights. Plaintiffs also offered the testimony of Drs. Cohen and Cialdini to prove that every class member's supposed beliefs about tar and nicotine deliveries caused every purchase of Lights in Illinois between 1971 and 2001. Both witnesses testified that

such beliefs had a general "directional influence" on purchasing decisions – but they admitted they could not quantify that "influence." R. 4855 (Cohen); *see also* R. 5056 (Cialdini). Furthermore, both witnesses admitted that other factors such as taste, popularity, and image also influenced purchasing decisions. *See, e.g.*, R. 4670-72, 4757-59, 4781 (Cohen); R. 5055-58 (Cialdini). Dr. Cohen stressed that the "key" determinant is the "weight" that any particular class member placed on each factor – something he did not know for any class member. R. 4703-05, 4718-19. PM USA's experts, Drs. Viscusi and Meyer, opined that consumers chose light cigarettes for a variety of reasons, some of which, like taste or flavor, had nothing to do with expected tar and nicotine delivery or the relative hazards of the cigarettes. R. 11145-61 (Viscusi); R. 6971-73 (Meyer) (discussing Gallup Poll in which 37% of light cigarette smokers said that they smoke a light cigarette because they "preferred the taste").

Public Health And FTC Recommendations. Dr. Peter English, an expert medical historian called by PM USA, provided undisputed testimony regarding the history of public health recommendations relating to lower yield cigarettes.[9] He testified that, beginning in the 1960s and continuing into the late 1990s, the public health community encouraged manufacturers to reduce tar and nicotine yields and encouraged smokers who would not quit to switch to lower yield cigarettes. R. 8054; *see also* R. 3135 (plaintiffs' expert Benowitz). These recommendations were based on a scientific consensus that lower yield cigarettes were less hazardous than full flavor cigarettes. R. 8053. That consensus in turn was based on epidemiological studies that showed that smokers of lower yield cigarettes had a lower risk of disease than smokers of higher yield cigarettes. R. 7983-85, 8051; *see also* R. 4077-78 (plaintiffs' expert Thun); R. 4275-76, 4466-72 (plaintiffs' expert Burns). Scientists were well aware that some smokers compensated and that smokers who fully compensated might not

[9] Throughout this brief, references to "low" and "lower yield" cigarettes refer to low yield cigarettes as measured by the FTC Method.

benefit from lower yield cigarettes. R. 8018-23 (English). Nonetheless, they believed that the epidemiology showed a real reduction in risk. R. 8028-29. Dr. English explained that scientists believed that the epidemiology inherently took into account any compensation that occurred because the studies were based on disease rates actually experienced by smokers grouped by their cigarette yield. *Id.* The epidemiology, therefore, was considered a reliable indicator of how smokers, on a population basis, were affected by smoking lower yield cigarettes. *Id.*; *see also* R. 3189 (Benowitz).

Dr. English further testified that the scientific consensus did not change until November 2001 (after the end of the class period). R. 8052. At that time, in response to a request by the FTC, the National Cancer Institute ("NCI") published Monograph 13, in which NCI re-evaluated the epidemiological data and concluded that there was "no convincing evidence" that lower yield cigarettes reduced the "disease burden" on a population basis. PX 14 at 146; Group 23(21). As plaintiffs' expert Dr. Michael Thun admitted, Monograph 13 marked the first time that a federal agency reached that conclusion. R. 4050-51.

PM USA also introduced the expert testimony of Dr. John Peterman, a former Director of the FTC's Bureau of Economics, who opined that PM USA's marketing of Lights at all times complied with the policies and objectives of, and was specifically authorized by, the FTC's regulatory program. *See generally* R. 6261-760. Plaintiffs did not offer any expert to rebut Dr. Peterman's testimony.

Injury And Damages. Dr. Harris provided plaintiffs' only estimate of damages. He estimated damages based on a so-called "contingent valuation analysis," R. 6123-24, which relied on a 276 person survey conducted in 2002 over the Internet by another plaintiffs' expert, Dr. J. Michael Dennis. R. 6025-27. The survey did not ask what the respondents would pay for Lights if they had known about PM USA's alleged deception. Rather, the survey asked respondents to (1) assume that Marlboro Lights were more hazardous than full flavor cigarettes, (2) imagine that

PM USA had invented a truly "safer" Marlboro Lights cigarette that was identical in all other respects to Marlboro Lights, and then (3) say how much of a discount they would have required before agreeing to purchase the more hazardous Marlboro Lights if the "truly safer" version were also on the market. *See* PX 74-A at 39. Based on the answers to this question, Dr. Harris opined that class members on average would demand a 92.3% discount from the market price to continue buying Lights. R. 6035. He applied this calculation to every purchase of Lights during the class period, added prejudgment interest, and concluded that the class as a whole suffered approximately $7.1 billion in damages. R. 6023-25. However, Dr. Harris was unwilling to testify that the underlying survey was scientifically valid, R. 6126, and Dr. Dennis himself admitted that the survey failed to measure consumers' "true beliefs" about Lights. R. 5591.

PM USA's expert, Dr. Viscusi, opined that plaintiffs' Internet survey was not a scientifically valid survey; he further testified that it failed to ask the proper questions. *See generally* R. 11199-319. He also testified (among other things) that the price of Lights always has been the same as the price of their full flavor counterparts, notwithstanding any perceived differences in tar and nicotine deliveries or safety. R. 11137. He explained that plaintiffs could not have suffered economic loss because PM USA did not charge, and plaintiffs did not pay, anything extra for the "light" feature of a cigarette. R. 11138-41.

Judgment

At the close of the evidence, PM USA moved to decertify the class and moved for judgment as a matter of law. C. 42749-800; C. 42814-17; C. 42888-94. Both parties submitted proposed findings of fact and conclusions of law. C. 43158-310; C. 43322-70. On March 21, 2003, the trial judge adopted plaintiffs' proposed findings of fact and conclusions of law *verbatim*, including typographical errors. C. 43378-428. In adopting plaintiffs' proposed findings of fact and conclusions of law, the trial judge found that:

- All class members interpreted the words "lights" and "lowered tar and nicotine" as a representation that Lights were safer, and every purchase of Lights in Illinois from

1971 through February 8, 2001 was based "at least in part" upon this representation. C. 43392.

- No class member received lower tar and nicotine from Lights because every class member at all times engaged in complete compensation. C. 43395.

- PM USA failed to disclose that "the 'tar' from [Lights was] higher in toxic substances and more mutagenic than the tar from" their full flavor counterparts, and this alleged omission rendered PM USA's use of the descriptors "fraudulent" even if "for some Class members the representation of 'lowered tar' were true." C. 43384.

- PM USA's defenses under CFA §10b and federal preemption failed because "[n]o regulatory body has ever required (or even specifically approved) the use" of the terms "lights" and "lowered tar and nicotine." C. 43414.

- Damages for every member of the class could be determined as an "aggregate average," amounting to 92.3% of each class member's total purchases. C. 43403-04.

The court awarded $7.1005 billion in compensatory damages (the full amount claimed by plaintiffs) as well as $3 billion in punitive damages. C. 43418, 43421-22. Of the $7.1005 billion in compensatory damages, $2.1137 billion is attributable to prejudgment interest over a 30-year period, C. 43406, and $4.9 billion is attributable to sales that occurred before February 10, 1997, outside the applicable three-year limitations period. *See* PX 138-J; PX 138-T. Without providing any notice to the class, the circuit court ordered that 25% of the compensatory award – or $1.78 billion – be paid to plaintiffs' counsel as "fair and reasonable" attorneys fees. C. 43425. The court also awarded individual damages of $11,384.77 to Price and $17,811.64 to Fruth. C. 43406-07. The court's only deviation from plaintiffs' proposed judgment was to impose a bond and reduce punitive damages from the requested $14.201 billion to $3 billion. *Compare* C. 43365 *with* C. 43421-22.

Despite entering final judgment, the court never addressed how individual class members would be required to prove their claims or how they could obtain a share of the damages. *See* C. 42888-94. Apparently assuming that a substantial sum would be left unclaimed, the court directed that, "under the Doctrine of Cy Pres," any "unclaimed funds in the compensatory award" would "be distributed to," among others, eleven law schools in Missouri and Illinois, "all

domestic violence programs in the State of Illinois," and "all of the Drug Court programs throughout the State of Illinois." C. 43426-27. With respect to punitive damages, the circuit court initially stated – even before closing arguments, *see* R. 6064 – that any punitive damages would be given to the State. C. 42421-22; C. 43425. However, when questions arose as to whether the State's 1998 settlement with PM USA barred the State from receiving punitive damages, R. 12932-35, the court modified its judgment so that the punitive award would revert to the class if the State were barred from recovery. C. 45749. This appeal followed.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN CERTIFYING THE CLASS

Under 735 ILCS 5/2-801, a class action is proper only if "(1) [t]he class is so numerous that joinder of all members is impractical; (2) [t]here are questions of fact or law common to the class, which . . . predominate over any questions affecting only individual class members; (3) [t]he representative parties will fairly and adequately protect the interests of the class; and (4) [t]he class action is an appropriate method for the fair and efficient adjudication of the controversy." *Id.* Plaintiffs bear the burden of proving each of these statutory requirements. *McCabe v. Burgess*, 75 Ill. 2d 457, 464 (1979). Class certification must be reversed if it constitutes an abuse of discretion. *Id.*; *see also Rodmaker v. Johns Holding Co.*, 205 Ill. App. 3d 520, 522 (4th Dist. 1990) (circuit court abused its discretion in certifying class in light of predominance of individual issues). However, if "the circuit court's exercise of discretion relies on an erroneous conclusion of law, review is *de novo*." *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680-81 (1st Dist. 2001).

A. The Court Erred In Certifying The Class Because Of The Predominance Of Individual Issues

The circuit court committed legal error in determining that virtually every element of plaintiffs' CFA claim was a "common" issue and abused its discretion in certifying this case as a class action. An issue is "common" only if the "successful adjudication of the purported class

representatives' individual claims will" resolve the issue for all class members. *Slimack v. Country Life Ins. Co.*, 227 Ill. App. 3d 287, 292-93 (5th Dist. 1992); *see also Society of St. Francis v. Dulman*, 98 Ill. App. 3d 16, 18 (1st Dist. 1981). As this Court explained in *Hagerty v. General Motors Corp.*, 59 Ill. 2d 52 (1974), when a decision in favor of a class representative "would not establish a right of recovery in any other customer . . . the required common interest of the purported class members in the questions involved is . . . lacking." *Id.* at 59.

In determining whether common issues predominate, courts look to the elements of the claim asserted and the applicable defenses. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (predominance inquiry requires an "understand[ing]" of the "claims [and] defenses"). To prevail on a CFA claim, a private plaintiff must prove not only that the defendant engaged in deceptive conduct, but also that he or she was deceived and that the deception caused actual economic damage. *See* 815 ILCS 505/1 *et seq.*; *see also Oliveira*, 201 Ill. 2d at 149; *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359, 373 (1998). That plaintiffs chose to proceed on behalf of a class does not change the substantive elements of a CFA claim. *See Ortiz v. Fibreboard*, 527 U.S. 815, 845 (1999) (class actions may not "abridge, enlarge or modify any substantive right"); *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (same).

Accordingly, to prove "deception" on behalf of the class, plaintiffs here were required to prove that (1) each class member believed that Lights would deliver lower tar and nicotine and therefore be a less hazardous cigarette, and (2) each class member in fact did not get what was supposedly promised: lower tar and nicotine and a less hazardous cigarette. To prove "causation," plaintiffs had to establish that PM USA's alleged deception caused each class member to purchase each pack of Lights during the 30-year class period. Finally, to prove "actual damage," plaintiffs had to establish that each class member sustained an economic loss as a result of the alleged deception. *See Oliveira*, 201 Ill. 2d at 149; *Zekman*, 182 Ill. 2d at 373.

As set out below, each of these elements – deception, causation, and actual damage – raises individual issues that can only be decided based on the specific facts and circumstances of each class member. Because individual issues predominate over any common ones, courts in three other jurisdictions have rejected class certification in identical "light cigarette" cases. *See Aspinall v. Philip Morris Cos.*, 2003 WL 21297272 (Mass. App. May 27, 2003) (A. 431), *leave granted for further appeal* (Mass. App. Aug. 22, 2003) (A. 448); *Cocca v. Philip Morris Inc.*, 2001 WL 34090200 (Ariz. Super. Ct. July 24, 2001); *Oliver v. R.J. Reynolds Tobacco*, 2000 WL 33598654 (Pa. Ct. Com. Pl. Dec. 19, 2000).[10] These decisions, in turn, are supported by overwhelming case law that bars class certification in smoking and health cases generally, including those based on consumer fraud statutes.[11] We address these three elements – deception, causation, and actual damage – below.

1. Whether Each Consumer Was Deceived Because He Or She Failed To Receive Less Tar And Nicotine Is An Individual Issue

Nothing is more fundamental than the requirement that plaintiffs prove that they did not receive what was allegedly promised – lower tar and nicotine. To the extent plaintiffs received what was promised, they were not deceived and could not have been injured. It is undisputed that as measured by the FTC Method – the only standardized method for measuring tar and nicotine

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[10] Two courts outside of Illinois have certified more limited classes. Both decisions are on appeal. *See Hines v. Philip Morris USA Inc.*, No. CL-01-1882 (Fla. Cir. Ct.) (only North American residents), *on appeal*, 4D02-941 (Fla. App.) (A. 455); *Marrone v. Philip Morris USA, Inc.*, No. 99-CIV 0954 (Ohio Ct. Comm. Pleas Sept. 24, 2003) (A. 460) (only six Ohio counties and a two-year statute of limitations period), *on appeal*, 03CA0120-M (Ohio Ct. App.). A third trial court certified a similarly limited class action, *Aspinall v. Philip Morris, Cos.*, C.A. No. 98-6002-H, slip op. (Mass. Super. Ct., Suffolk Cty., Oct. 3, 2001) (App. 416), but that certification subsequently was reversed on appeal (and is now on appeal before the Supreme Judicial Court). *Aspinall*, 2003 WL 21297272 (Mass. App. May 27, 2003) (A. 431), *leave granted for further appeal* (Mass. App. Aug. 22, 2003) (A. 448).

[11] No certification of a smoker class action (including consumer fraud cases seeking economic damages) has been affirmed on final appellate review. *See, e.g., Clay v. Am. Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999); *Hansen v. Am. Tobacco Co.*, 1999 U.S. Dist. LEXIS 11277 (E.D. Ark. July 21, 1999); *Barreras Ruiz v. Am. Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892 (N.Y. 1999); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *see also Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 444 (Fla. App. 2003) (collecting cases).

See R. 66-67, 73; C. 1654 (emphasis in original). Accepting those representations, the court based its initial certification decision on a finding that "claims for addiction . . . *are not* and *could not* be involved in this action." C. 1740 (emphases added). At trial, however, plaintiffs did a complete about-face, arguing that "*addiction is very important. And the reason is that it usually relates, first of all, as the driving force behind compensation.*" R. 4966 (Mr. Tillery) (emphasis added).[12] Based on plaintiffs' admission that addiction is "the driving force behind compensation," the circuit court should have, but refused to, decertify the class. *See* R. 12426.

Even apart from addiction, it was undisputed at trial that (1) not every smoker compensates, and (2) not every smoker who compensates does so completely. *Therefore, at least some smokers did in fact receive less tar and nicotine from smoking Lights – and therefore were not deceived.* However, in adopting plaintiffs' proposed findings *verbatim*, the circuit court accepted plaintiffs' misstatement of the record, concluding that each Lights smoker "engage[s] in what is called compensatory smoking behavior so as to receive 100% of the tar and nicotine that would be received by this smoker from the regular counterpart cigarette." C. 43395. The record directly contradicts that conclusion. Dr. Benowitz did not testify that every individual smoker compensates. Instead, he admitted that compensation is "complete" only on an "average," aggregate basis. R. 3103. He expressly acknowledged that some people do not compensate completely: "*some people take in less [tar and nicotine]* and some people take in more." *Id.* (emphasis added). Thus, Dr. Benowitz conceded that "*some people probably don't compensate fully.*" R. 3119 (emphasis added); *see also* R. 3103-04.

Dr. Benowitz further testified that the only way to determine which class members compensate fully would be to perform a "biomarker" test on each class member to measure the level of nicotine in his or her blood. *See, e.g.*, R. 3105; R. 3260. Plaintiffs, however, offered no

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[12] *See also, e.g.*, R. 2897-98; R. 5138-39; R. 5728; R. 2067; R. 4258-59; R. 4271-73; PX 14 at 39.

biomarker evidence. Indeed, plaintiffs did not introduce *any* evidence that the two class representatives – let alone each class member – failed to receive lower tar and nicotine.

The circuit court also cited the testimony of plaintiffs' expert, Dr. Farone, as demonstrating that PM USA knew that Lights "did not reduce the delivery of tar and nicotine compared to their regular counterparts." C. 43393. But Dr. Farone never testified that every class member obtained the same amount of tar and nicotine from Lights as from full flavor cigarettes. Indeed, Dr. Farone conceded that he had not "done any scientific measurement" of the amount of tar or nicotine received by any class member. R. 2873-75. At most, Dr. Farone testified only that Marlboro Lights were "*designed*" so that smokers *could* "get the same amount of nicotine as a Marlboro Red." R. 2440-41 (emphasis added). That testimony was legally and factually insufficient to establish that every class member received "the same amount of nicotine."[13]

The testimony of class members – ignored by the circuit court – confirms that actual tar and nicotine delivery is an individual issue. Several class members affirmatively testified that they did *not* compensate. R. 7322 (Webb); R. 10859 (G. Gebhart); R. 10297 (Norton). Others acknowledged the possibility that they may have received lower tar and nicotine from Lights. *See, e.g.*, R. 10996 (Whitt); R. 10452 (Reynolds). Still others, including all five individuals who

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[13] Even if Dr. Farone's testimony could be construed as somehow suggesting that every class member fully compensated at all times, such an opinion would lack sufficient foundation and should have been excluded under *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 76-77 (2002). Nowhere did Dr. Farone offer testimony of a generally accepted method supporting such a conclusion. Without such support, Dr. Farone's testimony was nothing more than *ipse dixit* testimony, lacking any foundation or scientific basis. Indeed, such an opinion would be contradicted by Dr. Benowitz, who conceded that not all smokers fully compensate. R. 3103-04, 3119. And as shown below, such an opinion also would be contradicted by the testimony of the class members, several of whom acknowledged that they did not compensate after switching to a light cigarette. R. 7322 (Webb); R. 10859 (G. Gebhart); R. 10297 (Norton).

served as class representatives, admitted that they never have been tested and do not know how much tar and nicotine they received from Lights. Group 42(1)-42(5).[14]

The issue is not whether smokers *could* compensate or whether *some* smokers did compensate. The issue is whether *all* smokers compensated and compensated *completely*. The court's conclusion that all smokers compensated completely is contradicted by the record. Whether a class member "compensated" is a critical individual issue that precludes class certification. *See Aspinall*, 2003 WL 21297272, at *1 (reversing certification because "the extent to which Marlboro Lights actually delivers such lower tar and nicotine is variable, dependent on individualized smoking patterns"); *Oliver*, 2000 WL 33598654, at *6 n.6 ("It would require individual trials to determine which smokers actually cover the perforations when they smoke, and which smokers smoke more cigarettes to achieve the same tar and nicotine levels [of] regular cigarettes.").

2. Whether Each Consumer Was Deceived Because He Or She Believed Lights Were Lower In Tar And Nicotine And Therefore Safer Is An Individual Issue

To recover, plaintiffs had to do more than show that class members failed to receive less tar and nicotine from Lights. Plaintiffs also had to show that class members *believed* they would receive less tar and nicotine and *believed* that Lights were therefore less hazardous. *See Zekman*, 182 Ill. 2d at 376; *Oliveira*, 201 Ill. 2d at 156. In *Zekman*, this Court concluded that a plaintiff could not recover where his own "testimony demonstrate[d] that he was not deceived by [the defendant's] actions." 182 Ill. 2d at 376. More recently, in *Oliveira*, this Court rejected a "market theory" of causation, holding again that a plaintiff must prove that he or she was

[14] Other class members testified the same way. *See* R. 2948 (Gaylord); R. 4153-55 (Linda Reynolds); R. 7209-10, 7230-31 (Anderson); R. 7314-16 (Webb); R. 10034, 10045-46 (Smith); R. 10134, 10144 (M. Norton); R. 10176, 10181-82 (P. Gebhart); R. 10236, 10243 (P. Bohm); R. 10302-03 (R. Bohm); R. 10345, 10347, 10383 (Seltzinger); R. 10404, 10415, 10441-42 (Crain); R. 10452 (Larry Reynolds); R. 10995-96 (Whitt); R. 11509-10 (Walker); R. 11651-52, 11662-63 (J. Norton).

personally deceived and that the deception caused the injury. 201 Ill. 2d at 155. Any class member who was not deceived by PM USA is just like Mr. Zekman or Mr. Oliveira and is not entitled to judgment.

To obtain certification, plaintiffs initially assured the circuit court that their case presented no issue of actual deception: "Whether or not [PM USA's conduct] deceived, very specifically under the Consumer Fraud Act, is not an element. . . . [O]ur claim is not a case that these people were specifically deceived." R. 28, 95. After certification, plaintiffs did another 180 degree turn, conceding that their claims did in fact require such proof. *See, e.g.*, C. 43325-26.

Here, deception is an individual issue because proof that the class representatives were deceived could not establish that any other class member was deceived. Further, nothing in the record supports the court's assumption that all class members had a "universal[]" belief as to the meaning of "lights" and "lowered tar and nicotine." C. 43391. Indeed, in light of ample public information available to class members about the FTC Method and compensation, *see infra* at I.A.6., a substantial percentage of class members likely understood that the words "lights" and "lowered tar and nicotine" referred to FTC Method results and that their own tar and nicotine intake could differ. Plaintiffs' own survey demonstrated that 23% of respondents did not interpret "lights" as referring to the delivery of lower tar and nicotine and 32% did not interpret "lowered tar and nicotine" as meaning less hazardous than full flavor cigarettes. *See* PX 74-A at 27-29. As one Pennsylvania court held, the question of "which individuals were deceived by the term 'light,' and which were not, would need to be determined on a trial to trial basis, thereby precluding certification of plaintiffs' proposed class." *Oliver*, 2000 WL 33598654, at *5.

3. Whether The Alleged Deception Proximately Caused Each Consumer To Purchase Lights Is An Individual Issue

Plaintiffs also had to establish that the alleged deception proximately caused their purchases and injuries. *Oliveira*, 201 Ill. 2d at 149; *Zekman*, 182 Ill. 2d at 373. Thus, plaintiffs had to show that they "would not have engaged in the transaction had the other party made

truthful statements." *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 60 (1994); *see also Evans v. Shannon*, 201 Ill. 2d 424, 435 (2002) (conduct must be a substantial factor).

In the class certification proceedings, plaintiffs argued that "individual variations in . . . reasons for smoking [Lights] are irrelevant for determining class certification." C. 215. Yet at trial, plaintiffs changed their position again and argued the opposite – that "the phrase 'Lowered Tar and Nicotine' universally communicated a reduced harm message to all Class members" and that this message was "at least one of the determining factors for their purchase decisions." C. 43335. The circuit court adopted plaintiffs' changed position, concluding that causation was a common issue. *See* C. 43381-82.

The circuit court's ruling – that every class member purchased every pack of Lights over the last 30 years because of the alleged deception – is not only inherently incredible, but directly contradicted by the class members' own testimony. Out of 23 class members who testified, 17 were still smoking and purchasing light cigarettes despite having learned of the alleged deception, including their supposed discovery that Lights were allegedly *more dangerous* than full flavor cigarettes. *See supra* at n.3. For example, Miles, one of the original class representatives withdrawn at the end of plaintiffs' case-in-chief, admitted that she would have purchased light cigarettes *no matter what*, because she "didn't like the flavor" of full flavor cigarettes, which were "[t]oo strong." R. 7916. Despite everything that she had learned about Lights, including allegations of increased levels of mutagenicity and carcinogens, she still would not switch to a full flavor cigarette even at the close of trial: "[Full flavor cigarettes are] way too strong. . . . Lights just feel better for your body." C. 43106.

Courts in other jurisdictions have refused to certify similar "lights" class actions because of the proximate cause requirement. *See Oliver*, 2000 WL 33598654, at *5 (because "[s]tudies show . . . that people smoke 'light' cigarettes for a myriad of reasons," it cannot be inferred that every class member "bought defendant's 'light' cigarettes for the same reason"); *Cocca*, 2001

WL 34090200, at *1 ("[W]ith respect to liability issues, there are significant differences . . . with respect to the reasons that individuals bought products."). Illinois law requires the same conclusion. *See Bass v. Prime Cable of Chicago, Inc.*, 284 Ill. App. 3d 116, 127 (1st Dist. 1996) (consumer's decision to continue purchasing product after learning about the alleged misrepresentation establishes as a matter of law that the misrepresentation was not material).

4. Plaintiffs' Expert Testimony Lacked Foundation And Failed To Establish That Belief And Causation Are Common Issues

In an effort to present the individual issues of belief and causation as common ones, plaintiffs introduced generalized testimony from three expert witnesses – Drs. Cohen, Cialdini, and Cummings – none of whom spoke to, examined, or surveyed a single class member or, indeed, surveyed *any* population for purposes of this lawsuit. This testimony did not and could not convert the individual issues of deception and proximate cause into common issues and should never have been admitted in the first place.

First, the testimony of these three witnesses violated the basic principle that there must be a factual basis for every assumption an expert makes and every opinion he or she offers. *See Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 96 (1995); *Navarro v. Fuji Heavy Indus.*, 117 F.3d 1027, 1031 (7th Cir. 1997). As this Court has stated, expert testimony may not be based on "mere conjecture or guess." *Dyback v. Weber*, 114 Ill. 2d 232, 244 (1986). If the expert's assumptions have "no factual support . . . , the [expert's] conclusions . . . do not create a question of fact." *Wilson v. Bell Fuels, Inc.*, 214 Ill. App. 3d 868, 875-76 (1st Dist. 1991); *see also Modelski v. Navistar Int'l Trans. Corp.*, 302 Ill. App. 3d 879, 887 (1st Dist. 1999) (abuse of discretion to admit expert opinion lacking "factual basis"); *Reed v. Jackson Park Hosp. Found.*, 325 Ill. App. 3d 835, 844 (1st Dist. 2001) ("no evidentiary basis" where expert did not examine plaintiff; "[e]xperts cannot base opinions on what may have occurred or what the expert believed might have happened in a particular case").

Second, the testimony of these witnesses failed the *Donaldson* test for admissibility. Under *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63 (2002), scientific evidence is admissible *only* "if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 77 (quotation omitted). Where there is inadequate foundation, the expert testimony is inadmissible. *See Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 222 (1st Dist. 2002) (excluding expert testimony based on assumptions, not data); *see also Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003) (abuse of discretion review applies to admissibility of expert opinion).

The circuit court relied on such flawed and inadmissible testimony to support its finding (incredible on its face) that *every* one of the estimated 1.14 million class members was deceived and that *every* class member purchased every pack of Lights because of the deception.

Dr. Cohen. Dr. Cohen opined that PM USA deceived "all people" by telling consumers that Lights were "light" and that Marlboro Lights had "lowered tar and nicotine." R. 4653. Dr. Cohen, however, simply *assumed* that everyone believed that the words "light" and "lowered tar and nicotine" meant "safer":

> Q. You testified, I believe, on direct, that you believe every single consumer of Marlboro Lights or Cambridge Lights cigarettes would believe that there is a health or safety attribute, correct?
>
> A. Yes, because it is on the package.
>
> Q. And you have done no study of the class on this point, have you?
>
> A. No. It is on the package. *I would assume that anyone who reads the package understands that.*
>
> Q. *That is an assumption of yours, you have not done any study, survey, or examination of the class, have you?*
>
> A. *No, I haven't.*
>
> Q. In fact, you never did any study of any group on this point, have you?
>
> A. I haven't done any quantitative study on that point.

R. 4723-24 (emphases added). Dr. Cohen acknowledged that he could not identify *any* survey

evidence to support his assumption that 100% of smokers believed Lights to be safer than their full flavor counterparts. R. 4804. To the contrary, he admitted that all published surveys contradicted his assumption:

> Q. Of the surveys we have seen, not a single one says 100% of smokers believe that lights are safer, correct? In any form of the questions that were asked in those surveys?
>
> A. None of those numbers is 100%.
>
> Q. None of these numbers are even greater than 50%, are they?
>
> A. *None of these numbers is greater than 40%.*

R. 4830 (emphasis added). Because there was no factual basis for Dr. Cohen's opinion, his testimony provides no support for the court's conclusion that deception was a common issue.

Dr. Cohen's "causation" testimony fares no better. He admitted that he could not testify that PM USA's advertising and marketing caused any class member's purchases:

> Q. Now, you would not put it that Philip Morris advertising and marketing for light cigarettes caused people to start smoking, would you?
>
> A. No, I won't. . . . The way people talk about cause is, makes it sound like an on/off switch. And in the real world, that is not how causation works.

R. 4854. He further admitted that smokers have many reasons for choosing a cigarette apart from what he called the "health attribute" and could not say "what weight any individual class member assigned to the health attribute." R. 4718. The most Dr. Cohen would say is that perceived safety had a "directional influence" on Lights smokers, R. 4855 – a jargonistic hedge that fails to meet the proximate causation test. *See Martin*, 163 Ill. 2d at 60.

Dr. Cohen's testimony on causation was legally inadequate for other reasons as well. His testimony was based on a hypothetical question – another assumption – that lacked any basis in the record. Plaintiffs' counsel asked Dr. Cohen which type of Marlboro Lights class members would choose if presented with (1) "the Marlboro Lights which Philip Morris actually sold," and (2) "a Marlboro Lights cigarette that really did deliver meaningfully less tar to all smokers [and]

is identical to the Marlboro Lights [that] Philip Morris actually sold . . . in every non-health respect, including taste and price." R. 4696-97; *see also* R. 4698-703 (same question for Cambridge Lights). Dr. Cohen answered that every class member would choose the latter. *See* R. 3595-97, 4698-703, 4747. But this hypothetical was legally meaningless. There was no evidence in the record that this fictional cigarette – one that delivered less tar to *all* smokers irrespective of smoking behavior – could be produced in such a way that it remained identical to actual Marlboro Lights, "including [in] taste and price." In the real world, the choice Dr. Cohen addressed never existed.

Indeed, the hypothetical asked the wrong question. The legally relevant question was whether class members would have purchased the real-world Marlboro Lights (and Cambridge Lights) at the same price even if they had known about the supposed deception. On that issue, there is no need to hypothesize; the real-world evidence establishes that the great majority of the testifying class members (17 out of 23) continued to buy light cigarettes even after they "discovered" the alleged deception. *See supra* at n.3. Dr. Cohen himself admitted that smokers choose Lights for reasons other than a desire to reduce their risk – *e.g.*, taste, popularity, and image.[15] Dr. Cohen's testimony, therefore, cannot support the court's conclusion that the alleged deception proximately caused all purchases of Lights during the 30-year period. *See, e.g.*, *Branum v. Slezak Constr. Co.*, 289 Ill. App. 3d 948, 960 (1st Dist. 1997) (upholding exclusion of expert testimony based on hypothetical questions not supported by the record).

Dr. Cialdini. The circuit court found that "Dr. Cialdini testified that the words 'Lights' and 'Lowered Tar and Nicotine' on the cigarette products at issue in this case meant 'less

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[15] *See* R. 4670-72, 4757, 4776-77, 4780-82. Class members confirmed these differences. *See, e.g.*, R. 7916 (Miles); R. 7169 (McHatton) (Marlboro Lights had "lighter taste," were "not as harsh," and "was a smoother cigarette"); R. 4523 (Izzi) (listed reasons for switching as "taste and price"); R. 10283 (Bohm) (friends recommended Marlboro Lights because Bohm would "like it a little better").

hazardous' to all Class members." C. 43388-89. But Dr. Cialdini gave no such testimony. Rather, he merely testified that *some* consumers believed Lights to be "safer." R. 4921; R. 5031-36. He admitted that he could not say that 100% – or any percentage – of class members believed that Lights were safer. R. 5031-36. Indeed, like plaintiffs' other experts, Dr. Cialdini never conducted any study of class members. If anything, Dr. Cialdini's testimony confirms that deception is an individual issue. Dr. Cialdini conceded that, of the "[t]en to twelve" studies that he reviewed, none showed that all smokers believed that lights were safer – and indeed all but one of those studies showed that *less than half* believed that lights were safer. R. 5059-60.

By adopting plaintiffs' proposed findings, the court also misstated Dr. Cialdini's testimony with respect to causation. According to the court, "Dr. Cialdini concluded that improved health was at least one of the determinative reasons for every Class Member to purchase either Marlboro Lights or Cambridge Lights." C. 43389. On cross examination, however, Dr. Cialdini admitted that he could not say that 100% of class members purchased Lights because they were deceived into believing that those cigarettes were healthier than other cigarettes. *See* R. 5034-36.

Dr. Cummings. The only other plaintiffs' witness who purported to address these issues was Dr. Cummings, but the circuit court's judgment did not even cite his testimony. Like plaintiffs' other experts, Dr. Cummings never studied any actual class member. Nevertheless, he presumed that all class members believed that Lights were less hazardous. *See* R. 3575-76, 3599.1, 3649, 3775-76. Dr. Cummings based this opinion on the *assumption* that perceived risk reduction was the only reason to buy Lights: "[T]here would be no other reason to smoke Marlboro Lights unless you thought you were getting less tar and that it would be better for you." R. 3847. As already noted, this assumption was contradicted by (1) class members, *see, e.g.*, R. 7168-69 (McHatton); (2) published surveys, *see, e.g.*, R. 3781; and (3) the admissions of Drs.

Cohen and Cialdini. Dr. Cummings' testimony, therefore, did not establish that deception and causation were common issues.

In short, the circuit court's findings that the individual issues of deception and causation were common ones were erroneous as a matter of law and fact. The testimony cited by the circuit court was inadmissible because it was based on speculation and assumptions that were directly contradicted by the experts' own admissions and by the testimony of class members.

5. Whether Each Class Member Sustained Actual Damage Is An Individual Issue

To establish a CFA claim, plaintiffs also were required to prove that each class member suffered "actual damage" as a result of the alleged deception. Thus, plaintiffs had to prove both the fact and the amount of damages for each class member. *See Martino v. McDonald's Sys., Inc.*, 86 F.R.D. 145, 147 (N.D. Ill. 1980) ("[T]he fact of damage question is distinct from the issue of actual damages. . . . Where proof of fact of damage requires evidence concerning individual class members, the common questions of fact become subordinate to the individual issues, thereby rendering class certification problematic."). These issues add to the overwhelming predominance of individual fact questions.

If a class member would have purchased Lights irrespective of the alleged deception, the deception caused no "actual damage." By contrast, if a class member would have quit smoking entirely but for the alleged deception, that class member may conceivably have a claim for actual economic damage resulting from the purchase of cigarettes that otherwise would not have been bought. Whether a class member sustained actual damage, therefore, is an individual issue. Notably, the record conclusively shows that most of the class members who testified continued to buy light cigarettes even after suing PM USA. *See supra* at n.3. Thus, plaintiffs cannot possibly assert that, absent the alleged deception, *all* class members would have quit or otherwise would have acted differently and avoided their alleged injury.

In an attempt to salvage the class and convert injury and damages into common issues, plaintiffs concocted a damages theory divorced from market reality and the conduct of actual class members. As demonstrated in Section IV.A., *infra*, plaintiffs' damages theory was fundamentally flawed. But even under plaintiffs' flawed damages theory, each class member would have to estimate the total amount he or she paid for Lights. Such a showing would require proof establishing when each class member began smoking Lights, the total number of packs purchased in Illinois, the years of purchase, and the price of each pack taking into account any promotion, discount, or coupon that was offered. *See Oliver*, 2000 WL 33598654, at *7. Such proof would have to account for the fact that people often start and stop smoking or change brands and amounts smoked during a lifetime. As the circuit court itself recognized, this process of "administering the judgment" is one that is "complex, indeed." *See* R. 12269-70. In light of the lure of a $7.1 billion compensatory damages fund to be distributed among qualifying class members, the process also is an invitation for fraud. *See Ludke v. Philip Morris Cos.*, 2001 WL 1673791 (Minn. Dist. Ct. Nov. 21, 2001) (refusing to certify class where calculating amount paid for cigarettes would be an individual issue and an invitation for fraud).

6. Plaintiffs' Invocation Of The Discovery Rule To Toll The Statute Of Limitations Raises Individual Issues

Finally, in determining whether individual issues predominate, a court also must consider applicable defenses. *Castano*, 84 F.3d at 742 n.15. Ordinarily, any claims arising from purchases made more than three years before the complaint was filed (here, before February 10, 1997) would be barred by the CFA's three-year statute of limitations. *See* 815 ILCS 505/10a(e); *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 76 (1995); *Hot Wax, Inc. v. Warsaw Chem. Co.*, 45 F. Supp. 2d 635, 647 (N.D. Ill. 1999). But plaintiffs have invoked the "discovery rule" to toll the running of the statute. In so doing, they have raised individual fact questions inconsistent with class treatment.

Under the discovery rule, each class member must prove that he or she *subjectively* did not know, and could not reasonably have discovered, information sufficient "to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Hermitage Corp.*, 166 Ill. 2d at 86. Because notice depends in part on personal knowledge, the invocation of the discovery rule raises individual fact issues that can be decided only on a person-by-person basis.

Plaintiffs never denied that, for years (if not decades) before this suit, individual class members were exposed to public information about compensation and the possibility of obtaining as much tar and nicotine from Lights as from full flavor cigarettes. In 1979, for example, the Surgeon General "warned that, in shifting to a less hazardous cigarette, [smokers] may in fact increase their hazard if they begin smoking more cigarettes or inhaling more deeply." DX 7076 at xiv.[16] Similarly, in 1976, *Consumer Reports* discussed the dangers of compensation. *See* DX 3690. The record is replete with other examples of public notice of these issues – including notice that low yield cigarettes may pose even greater dangers than full flavor cigarettes.[17]

Despite this evidence, the circuit court rejected PM USA's statute of limitations defense as to each class member based on its *assumption* that no class member knew that light cigarettes may be more harmful than full flavor cigarettes. *See* C. 43408-09. But plaintiffs failed to satisfy their burden of proving that this assumption was true. In any event, as this Court has held numerous times, a plaintiff need not be aware of the *entirety* of a defendant's alleged misconduct before the statute of limitations is triggered. *See, e.g., Hermitage Corp.*, 166 Ill. 2d at 85-86; *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981). In light of the publicly available information about compensation and the limitations of the FTC Method, many (if not all) of the

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[16] *See also, e.g.*, DX 7078 at v-vi, 5-15, 48-49, 52, 80, 86-87, 97-98, 180-81, 185 (1981 Report) (discussing differences between machine yields and actual delivery to smokers when they smoke "light" cigarettes); DX 7079 at 216-17 (1982 Report); DX 7081 at 12-13, 341-54 (1984 Report).

[17] *See also* DX 3964; DX 6915; DX 6917; DX 6914; Group 11(65); DX 6919; Group 3(2); Group 19(19); Group 19(30) at 2; DX 6900; DX 4625; DX 3643; DX 6920; DX 4612; DX 3972; DX 3982.

estimated 1.14 million class members knew or had reason to know of sufficient information to put them on notice of their claims before February 10, 1997. *See* C. 1798-800; C. 1028-31; C. 1100-07. Indeed, one of the former class representatives, Miles, admitted that in 1995 or 1996 she saw a television program discussing the same limitations of the FTC Method at issue here. *See* R. 7931-32.

In short, the circuit court erred in concluding that plaintiffs had carried their burden of proving that *not one* of the million-plus class members was on notice of his or her claims before February 10, 1997. By invoking the discovery rule, plaintiffs themselves raised individual fact questions that cannot be determined on a class basis.

B. The Circuit Court's Certification Deprived PM USA Of Its Right To Contest Individual Claims

The preceding discussion demonstrates that class certification was improper because individual issues predominated over – indeed, overwhelmed – common issues. The circuit court also erred in concluding that plaintiffs had satisfied another class action requirement – that the "class action [be] an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801(4). From the outset it was apparent that certification of the class would not be fair to PM USA: the sheer number and complexity of individual fact issues, combined with the size and scope of the class (comprising over a million people), made it impossible to provide PM USA with a meaningful opportunity to contest individual class members' claims. The court made no attempt to deal with the individual issues through a trial plan or otherwise. *See* C. 38208-302 (requesting trial plan); R. 1648-50 (denying trial plan). The end result was a trial that not only violated the class action statute, but also deprived PM USA of its right to due process under the Illinois and U.S. Constitutions. Ill. Const. art. I, § 2; U.S. Const. amend. XIV; *see also Beehn*, 321 Ill. App. 3d at 680-81 (de novo review applies to questions of law).

The circuit court erred by allowing plaintiffs to present their case largely through the testimony of experts who (without ever having talked to or examined a single class member) opined about class members "in general" – in other words, hypothetical class members who did not exist and therefore were not subject to cross examination at trial. *See supra* at pp. 10-15. The court compounded this error by refusing even to acknowledge the existence of individual issues; by denying PM USA access to individual class members (other than the few selected by plaintiffs' counsel) through discovery or trial cross examination, C. 17933; C. 26616-18; and by structuring the trial to eliminate individual issues from ever being tried. These rulings violated due process because PM USA was entitled to test plaintiffs' speculative expert "proofs" with evidence of actual class members whose particular circumstances would have not only contradicted the experts' generalizations, but also disproved class members' individual claims. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 493 (E.D. Pa. 1997) (refusing to determine individualized issues such as injury and damages "on a class-wide basis" through expert testimony, statistical extrapolation, and claims forms, which "would abrogate the constitutional rights of defendants"), *aff'd*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 144 (3d Cir. 1999).

For example, as described above, Drs. Cohen, Cialdini, and Cummings testified that all class members were deceived based on theoretical generalizations, not based on any examination of any class members whose supposed beliefs PM USA could examine and challenge. *See supra* at I.A.4. PM USA could not directly rebut this testimony with evidence of what real class members believed because it had been precluded from taking discovery of even a representative sample of absent class members. C. 17933; C. 26616-18; *see In re Chevron*, 109 F.3d 1016, 1020 (5th Cir. 1997) (trial based on sample of plaintiffs selected by counsel violates due process).

Because PM USA had no practical opportunity to dispute plaintiffs' experts' testimony or the claims of the overwhelming majority of class members, the court in effect created an irrebuttable presumption that every class member had a valid claim. That presumption impermissibly changed the substantive law and violated PM USA's right to due process. *See, e.g., Sandwich Chef of Texas, Inc. v. Reliance Nat'l. Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2003) (reversing class certification because procedures denied defendants opportunity to dispute individual issues on an individual basis); *see also Agency for Health Care Admin. v. Assoc. Indus. of Florida*, 678 So. 2d 1239, 1254 (Fla. 1996) (*de facto* irrebutable presumption that individual claims were valid violates due process); *In re Fibreboard Corp.*, 893 F.2d 706, 712-13 (5th Cir. 1990) (rejecting trial court's proposal to try 3,000 asbestos cases in the aggregate on ground that trial could achieve "[c]ommonality" "only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 315 (5th Cir. 1998) (defendant has a right to individualized evidence from plaintiffs).

In *Broussard v. Meineke Disc. Muffler Shops Inc.*, 155 F.3d 331 (4th Cir. 1998), the Fourth Circuit explained the fundamental unfairness of procedures similar to those used below. In *Broussard*, a class of franchisees brought a fraud action against Meineke. The trial court permitted the franchisees to obtain a class-wide judgment based on an amalgamation of testimony provided by ten franchisees handpicked by plaintiffs' counsel. The Fourth Circuit rejected this procedure and ordered the class decertified because the "plaintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Id.* at 344-45. As a result, "Meineke was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Id.* at 345.

The due process violation here is even more egregious. In *Broussard*, although the evidence was composite, it at least was based on actual testimony from actual class members. Here, by contrast, plaintiffs' experts did not combine facts obtained from actual class members. Rather, they hypothesized a perfect plaintiff based on arm-chair assumptions – many of which were contradicted by the testimony of the few class members handpicked by plaintiffs' counsel and by surveys of smokers. The effect was to try PM USA's conduct in the abstract, untethered to the facts of any particular class member or claim. The result deprived PM USA of its due process right to test the inherently individual issues raised by the claims of class members to determine if their claims are valid.[18]

In its class certification order, the circuit court suggested that a claims administration process could be used to resolve individual issues and thus mitigate any unfairness created by the class certification. *See* C. 1740. Ultimately, however, the court made such an opportunity impossible, by finding against PM USA on all essential elements of a CPA claim, imposing aggregate damages, and providing a formula for awarding damages to individual class members. C. 43383-407. The sole task remaining under the judgment is the allocation of damages among class members. Although such an allocation would be a complicated and time-consuming task in its own right, any resulting proceedings would not provide PM USA with the opportunity to dispute the core elements (deception, causation, and actual damage) of any individual class member's claim. *See, e.g.*, C. 43383-84, 43391, 43403-04; *see also* C. 38208-302.

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[18] The court erred and heightened the unfairness of the proceedings by admitting evidence of PM USA's conduct relating to a wide range of issues other than Lights without a showing that such conduct had any impact on or connection to the claims of any class member. *See, e.g.*, R. 2428-31 (Farone) (admitting documents from other tobacco companies); R. 4580-88 (Cohen) (same); R. 5920-21, 5970-72, 5977 (admitting documents relating to brand other than Lights); R. 1952-54 (admitting congressional testimony); R. 2293-94, 2322-26 (Farone) (same); R. 4602-12 (Cohen) (admitting lobbying evidence); R. 4564-4630 (Cohen) (admitting testimony regarding "disinformation" on whether smoking causes disease); R. 4280-82 (Burns) (admitting *60 Minutes II* program).

The unfairness and the resulting due process violations extend even beyond this case. From the outset, plaintiffs' counsel demonstrated their intention to use a judgment in this class action as a sword in later-filed personal injury actions on behalf of individual class members. Thus, in plaintiffs' initial class definition, they specifically requested a reservation of class members' personal injury claims – a reservation adopted by the circuit court and repeated in the judgment. C. 43382; C. 1740. Then, when plaintiffs' counsel provided publication notice to the class, they placed alongside of the notice a solicitation for Lights smokers with personal injury claims. *See, e.g.*, C. 12972-73; C 17744. Following entry of the judgment, plaintiffs' counsel have filed separate personal injury lawsuits on behalf of individual absent class members, asserting violations of the CFA and other causes of action based on the same allegations of misconduct.[19]

Although plaintiffs' counsel's strategy has not yet fully played out, it seems apparent that they intend to argue that PM USA is precluded by the judgment from contesting most of the elements of any personal injury claim brought on behalf of any member of the class. Thus, members of the class who claim to have suffered personal injuries as a result of smoking Lights would argue that they are not required to prove that they were personally deceived or that any such deception actually caused them to purchase Lights. Rather, these class members would claim that the judgment was preclusive on the issues of deception and causation and that they are

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[19] *See Sandrowski v. Philip Morris USA Inc.*, No. 03L1022 (Ill. Cir. Ct. July 18, 2003) (removed to S.D. Ill., No. 03-CIV-0555 (MJR)) (A. 512); *Kelly v. Philip Morris USA*, No. 03-L-242 (Ill. Cir. Ct. Feb. 21, 2003); *Stubblefield v. Philip Morris USA*, No. 03-L-588 (Ill. Cir. Ct. May 5, 2003); *Lowry v. Philip Morris USA Inc.*, No. 03-MR-588 (Ill. Cir. Ct. Oct. 9, 2003) (removed to S.D. Ill., No. 03-C V-661-GPM) (petition to take discovery in anticipation of complaint); *Gaither v. Philip Morris USA Inc.*, No. 03-MR-648 (Ill. Cir. Ct. Nov. 3, 2003) (removed to S.D. Ill., No. 03-CV-750) (petition to take discovery in anticipation of complaint); *Corder v. Philip Morris USA, Inc.*, No. 03-MR-687 (Ill Cir. Ct. Nov. 21, 2003) (petition to take discovery in anticipation of complaint). In addition, plaintiffs' counsel have filed a personal injury action against retailers of light cigarettes. *See Squires v. Martin & Bayley, Inc.*, No. 03-L-1491 (Ill. Cir. Ct. Oct. 30, 2003) (A. 477). This Court may properly take judicial notice of the filing of these lawsuits. *See, e.g., Sundance Homes, Inc. v. County of DuPage*, 195 Ill. 2d 257, 275 (2001).

required to prove only medical causation. In this way, class members would seek to use the reservation and judgment to make an end-run around the requirements of *Oliveira* and *Zekman* – all without giving PM USA an opportunity to dispute their individual claims. Such a result would violate due process. *See Goldberg*, 397 U.S. at 269.

Finally, there is no question that the circuit court reserved the personal injury claims to allow claim splitting by class members with personal injury claims. This Court has never approved a reservation allowing a plaintiff to split claims for purposes of evading the predominance requirement of the class action statute.[20] Nor should it do so here. The court's reservation of personal injury claims, if allowed, would create the very multiplicity of suits that the class action device – and the rule against claim splitting – was designed to prevent. *See, e.g.*, *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 506 (2002) ("[a]n entire claim arising from a single tort cannot be divided and be the subject of several actions").

Nor is this merely a matter of Illinois law. The circuit court's reservation implicates the claim splitting rules in numerous other jurisdictions. Because of the worldwide nature of the class (which includes anyone who ever purchased a pack of Lights anywhere in Illinois over a 30-year period), class members may bring personal injury claims anywhere in the country (if not the world). Furthermore, because a class member's personal injury may result from the entirety of his or her smoking history – not just the Lights purchased in Illinois – such a claim may be governed by the law of a state other than Illinois. There is simply no way to know whether the circuit court's reservation here will be respected by other courts around the country who could be faced with personal injury claims brought by absent class members. Courts throughout the country have often refused to certify classes when the only way to do so is to allow claim

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[20] This Court previously has approved reservations under certain limited circumstances not present here. *See Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403 (2002) (settlement); *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 341 (1996) (suggesting in dicta that reservation may be acceptable where plaintiff voluntarily dismisses certain claims).

splitting. Courts have expressed the concern that absent class members will be denied their right to litigate substantial individual claims that have purportedly been reserved. For that reason, these courts have concluded that class representatives who seek to split the claims of class members are not an "adequate representatives" as required for class certification. *See, e.g.*, *Small*, 720 N.E.2d at 897; *Thompson*, 189 F.R.D. at 550; *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606-07 (S.D.N.Y. 1982); *Hoyte v. Stauffer Chem. Co.*, 2002 WL 31892830 at *42 (Fla. Cir. Ct. Nov. 6, 2002); *In re Methyl Tertiary Butyl Ether (MTBE)*, 209 F.R.D. 323, 338-39 & n.23 (S.D.N.Y. 2002). These same concerns apply here and require decertification.

C. Plaintiffs Failed To Provide Adequate Notice To Absent Class Members

The judgment also must be reversed because the circuit court did not adequately notify absent class members of their right to opt out of this lawsuit. The court's failure to give proper notice requires that the judgment be vacated and class members properly notified. *See Waters v. City of Chicago*, 111 Ill. App. 3d 51, 56 (1st Dist. 1982). Because the failure to provide individual and otherwise adequate notice violated state and federal due process, this Court reviews the error de novo. *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003).

Although Illinois and federal notice requirements may not always be identical, *Wilcox v. Equity Funding Life Ins. Co.*, 61 Ill. 2d 303, 311 (1975), all class notices must comply with due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("Minimal procedural due process protection" requires adequate notice to absent class members). Absent class members "must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* As this Court has made clear, "where the identity and address of each class member is readily accessible by use of defendant's files, individual

notice is required to insure that each class member's right to pursue his claim is protected." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974) (publication notice is a "poor substitute" for individual notice); *Fox v. Northwest Ins. Brokers, Inc.*, 113 Ill. App. 3d 255, 258 (1st Dist. 1983) (same). Proper notice protects a defendant's interest in finality and the avoidance of multiple suits, while protecting absent class members' interests in not being bound by an action to which they did not consent. *See, e.g.*, *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226-27 (11th Cir. 1998); *In re Vitron Computer Sys. Corp. Litig.*, 614 F.2d 11, 14 (1st Cir. 1980). The need for individual notice was particularly important here, given that plaintiffs have split the claims of class members with personal injuries, *see supra* at I.B., jeopardizing their ability to assert future personal injury claims in separate proceedings. *See, e.g.*, *Frank v. Teachers Ins. & Annuity Assoc. of Am.*, 71 Ill. 2d 583, 596 (1978) (individual notice important where there are "differing interests among class members").

Plaintiffs could have provided individual notice to a substantial portion of the class. PM USA maintains a database that contains the names and addresses of hundreds of thousands of adult Lights smokers living in Illinois who have consented to receive promotional items and communications. *See* C. 43989-44001; C. 38195-200; *see also* R. 805; C. 26616. Plaintiffs, however, refused to use this database to provide any individual notice. *See, e.g.*, R. 1223. In an extraordinary statement, plaintiffs opposed individual notice because it would inform class members of their due process right to opt out:

> I believe that the reason they want to send out 200,000 notices when we've got probably a couple million smokers involved is in order to get a group of people that will opt out. They can have them contact with these opt out people under the rule. Since they're no longer a part of a class if they opt out, they can then contact these people to do what this Court has already said they shouldn't do in the absent member class, have this additional widespread discovery going on.

Id. Plaintiffs' stated rationale for opposing individual notice conflicts with the very reason that the best practicable notice is required: to inform class members of their right to opt out.[21]

Furthermore, the publication notice was a far cry from the best practicable because it reached only a minuscule fraction of the class. The court required only a single notice in 18 regional newspapers and two notices in the *Chicago Tribune* and the *St. Louis Post-Dispatch*. *See* C. 12963-73; C. 14152; R. 838-40; C. 17742-46. The only other provisions for notice were a single publication in *USA Today*; a posting on an Internet website; and a press release to PR Newswire's International Newslines service -- a service that makes postings available to journalists but provides no assurance that anything will be published anywhere. *See* C. 17742-46; C. 43257-60. This limited publication notice was unsupported by any expert and grossly inadequate. According to PM USA's expert Kent Lancaster, only 0.6% of U.S. adults would see the notice and only 0.2% would actually read it. C. 13256-57. Even within Illinois, only 11% of class members would see the notice and only 4% would read it. C. 13255.[22]

Finally, the court erred in providing absolutely no notice to absent class members before taking $1.78 billion from them and giving it to plaintiffs' counsel in the form of an attorneys' fee award. The court, at the very least, should have provided absent class members with an opportunity to object to this mammoth and unconscionable award. *See, e.g., Client Follow-Up Co. v. Hynes*, 105 Ill. App. 3d 619, 625-27 (1st Dist. 1982); *In re Fine Paper Antitrust Litig.*, 751

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[21] Plaintiffs also filed a two page "report" concerning the database, asserting that some of the addresses in the database were invalid and that the database included Marlboro Lights smokers who were not class members (*i.e.*, had never purchased cigarettes in Illinois). C. 15702-03. The circuit court, however, did not state that it was basing its refusal to order individual notice on plaintiffs' challenge to the accuracy of PM USA's database. In fact, the court indicated that it "wasn't quite as impressed with" plaintiffs' report and believed it to be "very brief" and "sketchy." R. 1113-14.

[22] This argument refers to the notice given to the ultimate class -- all purchasers who bought even a single pack of Lights in Illinois. Before the class was expanded to be worldwide in scope, plaintiffs published a similar notice in only a few "Illinois regional newspapers." C. 2775.

F.2d 562, 584 (3d Cir. 1984); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *cf.* Fed. R. Civ. P. 23(h)(1) (requiring notice be given to the class of counsel's fees).

The judgment should be set aside for the failure to give adequate notice.

II. THE CIRCUIT COURT ERRONEOUSLY REJECTED PM USA'S DEFENSES ARISING OUT OF THE FEDERAL SCHEME GOVERNING LABELING, ADVERTISING, AND TAR AND NICOTINE DISCLOSURES

The circuit court also committed legal error in rejecting PM USA's defenses arising out of the decades-long comprehensive federal scheme governing cigarette labeling, advertising, and tar and nicotine disclosures. As demonstrated below, the federal government's regulatory scheme gives rise to four defenses that bar plaintiffs' claims as a matter of law: (1) §§ 2 and 10b of the CFA, (2) express federal preemption, (3) implied conflict preemption, and (4) the First Amendment. This Court reviews the questions of law raised by these defenses de novo. *See, e.g.*, *Woods v. Cole*, 181 Ill. 2d 512, 516 (1998).

A. Historical And Regulatory Context Of Light Cigarettes

As a threshold matter, we summarize the historical and regulatory context in which Lights were developed and marketed, which forms the basis of PM USA's regulatory defenses.

The FTC's Tar And Nicotine Program. Almost 50 years ago, in September 1955, the FTC issued its Cigarette Advertising Guides, which set forth the FTC's policies on the disclosure of tar and nicotine yields in cigarettes. *See* Group 5(2). The 1955 Guides permitted cigarette manufacturers to make claims regarding tar and nicotine yields – but only if they could substantiate their claims "by competent scientific proof." *Id.*

In the late 1950s, scientists observed a dose-response relationship between exposure to cigarette tar and tumors in laboratory animals. R. 7969-71 (PM USA's expert English); R. 3131-32 (plaintiffs' expert Benowitz). Many cigarette manufacturers responded by testing the amount of tar produced by their cigarettes and advertising the results. *See* R. 6676 (PM USA's expert Peterman). Different manufacturers, however, used different test methods, making it difficult to

compare yields. In 1960, the FTC concluded that the use of different test methods caused consumer confusion. *See, e.g.*, R. 6381 (Peterman); Group 5(7); Group 6(7) at 29. The FTC therefore declared that it would construe all such disclosures as *per se* unsubstantiated health claims and *per se* deceptive – and would file enforcement actions against such disclosures. *See, e.g.*, Group 5(7); R. 6381-82 (Peterman). The FTC's declaration effectively banned all tar and nicotine disclosures. *See, e.g.*, R. 6383 (Peterman); Group 22(12) at 1-2; Group 6(12).

By 1966, however, a scientific consensus began to emerge that reducing tar and nicotine yields might reduce the risks of smoking. *See, e.g.*, R. 7970-73, 7976-78 (English); R. 3132 (Benowitz); Group 8(4). The FTC responded by reversing its position and adopting two policy goals: (1) to "augment information available to the public on the tar and nicotine content of cigarettes," and (2) to "prompt cigarette manufacturers to develop less hazardous cigarettes." Group 2(4) at 17 (1968 FTC Report); *see also* Group 8(4); R. 6385-88 (Peterman). To implement these goals, the FTC took a series of actions.

First, the FTC selected a single, uniform method for testing tar and nicotine yields. *See* R. 6387 (Peterman). From the beginning, PM USA (and others) cautioned the FTC that any single, uniform testing method "cannot measure the[] many variations in human smoking habits." Group 8(19) at 3; *see also* Group 8(17) at 4; Group 8(18) at 38. The FTC understood that no uniform test could accurately measure how much tar and nicotine any individual smoker would receive from any particular cigarette. Group 8(18) at 38, 40; Group 8(22); R. 6342 (Peterman). Likewise, the FTC understood that any uniform test would not account for compensation by individual smokers. Group 8(22); Group 8(18) at 38, 40; Group 8(19) at 2-3. The FTC concluded, however, that these limitations were outweighed by the need for a uniform test to provide a basis for comparison. *See* R. 6344-48, 6387-91 (Peterman); Group 8(22) at 1.

In 1967, the FTC adopted the "Cambridge Method" (also, known as the "FTC Method") as the sole official test for measuring tar and nicotine yields. Group 5(2). The FTC determined

that this test provided a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." Group 8(22) at 1. The FTC declared that, if manufacturers' tar and nicotine disclosures were based on FTC Method results, they would be deemed substantiated and would not result in any regulatory action. R. 6340-42, 6440-41 (Peterman); Group 8(4).

Second, the FTC sought to inform consumers about tar and nicotine yields by giving FTC Method results the "widest possible circulation." Group 2(3) at 1. The FTC published its results in the Federal Register, *see* R. 6439 (Peterman), and in annual reports to Congress. *See, e.g.*, Group 22(12) at 2; Group 8(8) at 17271-72. Other governmental agencies also promoted lower yield cigarettes. *See, e.g.*, DX 3849 at 3; Group 37(3); DX 4746. The FTC also authorized manufacturers to include in their advertising a "factual statement of the tar and nicotine content (expressed in milligrams)" as measured by the FTC Method. Group 8(4); *see also* Group 8(22) at 1-2. In 1970, the FTC went even further, proposing a trade regulation rule *requiring* manufacturers to include FTC Method results in all cigarette advertising. *See* Group 9(9). The rule, however, proved unnecessary after the FTC obtained a voluntary agreement from the industry accomplishing the same objective. Group 19(6) at 13; Group 9(10); Group 9(11); Group 9(16); R. 6442-43 (Peterman). Since then, PM USA's advertisements have included a legend informing consumers of the tar and nicotine yields as reported in the annual FTC Report or as measured "by FTC method." *See, e.g.*, Group 9(15); Group 23(5) at 48158; DX 3350.

Third, to provide additional information to consumers, the FTC allowed cigarette manufacturers to use descriptors such as "low tar." In 1968, the FTC itself began using the term "low tar," which it later "officially defined" as 15 milligrams of tar or less according to the FTC Method. Group 2(4) at 18-19; Group 13(4) at 11. In 1969, the FTC brought an enforcement action against American Brands for stating that certain brands were "lower" in tar when the claim was *not* substantiated by FTC Method results. Group 14(2). In a 1971 consent decree resolving

the case, the FTC publicly declared that it would permit the use of terms such as "low," "lower," "reduced," or "like qualifying terms," provided that their use was substantiated by FTC Method results. *See* Group 14(3) at 2-3; R. 6467-68 (Peterman). By entering into this consent decree, the FTC intended to inform other manufacturers that such descriptors were permissible so long as they referred to cigarettes that yielded 15 milligrams of tar or less under the FTC Method. R. 6458-62 (Peterman); Group (1)(3) at 19; Group 13(4) at 11. The FTC deemed descriptive statements based on FTC Method results to be *per se* substantiated. *See* Group 14(3) at 2-3; R. 6342 (Peterman). The FTC expressly considered its actions in this respect to be "regulatory activity." *See, e.g.*, Group 19(6) at 13; Group 19(4) at 17-19; Group 19(7) at 11-13.

Congress's Regulatory Role. In 1965, Congress enacted the Labeling Act, mandating that a specific warning label appear on all cigarette packs. *See* Pub. L. 89-92, 79 Stat. 283 (1965). Congress has twice changed the mandatory warning – in 1969 and 1984. Group 4(1) at 2; Group 4(8) at 3. Before the 1984 revision, both the FTC and the Surgeon General recommended to Congress that any new warnings address the possibility of compensation. *See* DX 7078 at vii; DX 7076 at xiv; Group 5(12) at 1-56-1-57; R. 6460-63, 6500 (Peterman). Congress declined to include any such warning. *See, e.g.*, Group 41(1) at 476, 480-81; R. 6500 (Peterman).

The FTC's Tar And Nicotine Program Through The Class Period. In the 1970s, 1980s, and 1990s, the FTC periodically re-evaluated its method, particularly in light of concerns that its smoking machine did not measure actual tar and nicotine deliveries – the crux of plaintiffs' allegations here. *See, e.g.*, R. 6394-96 (Peterman).[23] After extensively studying compensation and consulting with scientists – including plaintiffs' expert Dr. Benowitz – the FTC on each

[23] For example, in 1977-78, the FTC considered whether to change the FTC Method in light of the clear understanding by the public health community and the FTC that some smokers covered ventilation holes when smoking – and that doing so increased tar and nicotine deliveries. Group 10(10); *see also* DX 7078 at 48-52. The FTC decided to retain the FTC Method without any changes.

occasion elected to retain the FTC Method, relying on the epidemiological findings of reduced risk. *See* Group 22(12) at 7; R. 6420-23 (Peterman); Group 1(2) at 18-26.

Furthermore, the FTC continued to authorize cigarette manufacturers to include FTC Method results – but only FTC Method results – in advertising. In 1978, for example, the FTC issued an advisory opinion[24] reaffirming that, to avoid "consumer confusion," "tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number." Group 15(5); *see also* R. 6447-48 (Peterman). The FTC explained that any tar and nicotine claims not based on the FTC Method would be deemed unsubstantiated and impermissible. Group 15(5). The FTC rejected the advertising of any other test method results, even if those results were *higher* than FTC Method results. *Id.*

The FTC also continued to authorize the use of descriptive terms such as "low tar" to refer to FTC Method results. Between 1976 and 1981, the FTC staff conducted a broad-ranging investigation of cigarette advertising, including "lights" advertising. *See* Group 5(12); Group 20(1)-(13); R. 6460-64, 6495-506 (Peterman). In 1988, the FTC informed Congress that it should *not* amend the Labeling Act to permit states to impose additional or different duties with respect to lights and low tar advertising, arguing that this would create "irreconcilable conflict[s]" with the FTC's tar and nicotine program. Group 3(6) at 8. The FTC launched another investigation in 1992, this time focused on whether the terms "lights" and "low tar" were deceptive and therefore should be banned. Group 21(1)-(12); R. 6500-21, 6700-02 (Peterman). In each instance, the FTC reaffirmed that terms such as "low tar" and "lights," if substantiated by FTC Method results, were not false, unfair, or deceptive under the FTC Act. *See* R. 6744 (Peterman). Indeed, in a 1994 consent decree with American Tobacco, the FTC reaffirmed its authorization of "express or implied representation[s] . . . that [a] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine" if

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[24] The FTC is bound by its advisory opinions. *See* 16 C.F.R. §§ 1.1, 1.3; *Trans Union Corp. v. FTC*, 245 F.3d 809, 818 (D.C. Cir. 2001).

substantiated by the FTC Method. *See* Group 16(5) at 4; *see also* Group 18(9); R. 6472-77 (Peterman); *see generally* PX 14.

Emerging Concerns About Low-Yield Cigarettes. In 1997, the FTC sought public comment as to whether it should change its policies regarding its testing method and the use of descriptors. Group 22(5). At the FTC's request, the National Cancer Institute studied the issues and in November 2001 -- after the end of the class period here – published Monograph 13. *See, e.g.*, Group 22(2); R. 8050 (PM USA's expert English); *see supra* at p.13 (describing Monograph's conclusions). The FTC is now evaluating whether to change its policies in light of the Monograph's conclusions. *See* R. 6345, 6434-36 (Peterman).[25]

B. The CFA Bars Plaintiffs' Claims

In enacting the CFA, the General Assembly intended to create a scheme that would be complementary to and entirely consistent with federal law. Thus, § 2 provides that, in construing what constitutes an "unfair or deceptive" act or practice under the CFA, "consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45." 815 ILCS 505/2.

In addition, § 10b of the CFA exempts from liability any conduct that is "specifically authorized" by federal laws, rules, or regulations:

> Nothing in this Act shall apply to any of the following: (1) Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this state or the United States.

815 ILCS 505/10b; *see also* 815 ILCS 510/4 (similar provision for UDTPA). Both sections apply here to bar plaintiffs' claims.

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[25] In September 2002, PM USA filed a petition with the FTC seeking formal rulemaking to address how PM USA should proceed with respect to FTC Method testing and descriptors. R. 9928-32 (PM USA's witness Lund); DX 7543 (petition). PM USA's petition is pending. R. 9931-32 (Lund).

1. Under § 2, PM USA's Use Of Descriptors Was Not Deceptive Because The FTC Method Substantiated The Descriptors

The circuit court concluded that PM USA could not defend its use of the terms "lights" and "lowered tar and nicotine" by relying on the fact that these terms were substantiated by FTC Method results. C. 43414. In reaching that conclusion, the court failed to follow the dictates of § 2 of the CFA, which required the court to take account of the FTC's interpretations of the FTC Act in deciding whether a practice is "deceptive" or "unfair" within the meaning of the CFA. If a label is not deemed "deceptive" for purposes of the FTC Act, it should not be considered "deceptive" under the CFA. In *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403 (2002), this Court cited with approval the factors that the FTC considers in measuring unfairness and applied those same factors in evaluating conduct under the CFA. *Id.* at 417.

Following *Robinson*, the circuit court should have used the same test that the FTC uses in deciding whether tar and nicotine claims are deceptive – *i.e.*, whether those claims are "substantiated" by FTC Method results. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994) (substantiated claims are not deceptive under FTC Act); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986) (same). As discussed above, the FTC has for decades taken the position that "low tar" claims made by cigarette manufacturers will be deemed "substantiated" and therefore not deceptive if they are supported by FTC Method results. Furthermore, it is undisputed that PM USA's use of descriptors with respect to Lights has always accurately reflected FTC Method results. Given the extensive federal involvement in these issues and the statutory policy to interpret the CFA consistently with federal law, this Court should find that substantiation pursuant to the FTC Method also satisfies the requirements of the CFA.

2. CFA § 10b Bars Plaintiffs' Claims

Section 10b also bars liability here as a result of (1) the FTC's regulatory scheme governing tar and nicotine disclosures, and (2) Congress' regulation of cigarette advertising and labeling through the Labeling Act.

a. The FTC's Regulatory Scheme Demonstrates That PM USA's Use Of Descriptors Was "Specifically Authorized" By Federal Law

This Court has repeatedly held that § 10b should be construed consistent with the "policy throughout Illinois law against extending disclosure requirements beyond what is mandated by federal law." *Jackson v. S. Holland Dodge, Inc.*, 197 Ill. 2d 39, 49 (2001); *see also Jarvis v. S. Oak Dodge Inc.*, 201 Ill. 2d 81, 88 (2002); *Lanier v. Assoc. Fin., Inc.*, 114 Ill. 2d 1, 17 (1986); *Hill v. St. Paul Fed. Bank for Sav.*, 329 Ill. App. 3d 705, 713 (1st Dist. 2002).

In *Lanier*, a borrower brought a CFA claim alleging that her lender had deceptively failed to disclose that her interest rate would vary depending upon when she paid off her loan. Although the lender had disclosed that interest would be computed according to the "Rule of 78's," the lender had failed to explain how the Rule worked. 114 Ill. 2d at 8-11. This Court held that § 10b applied to bar the claim. The Court began its analysis by recognizing that Congress enacted the Truth in Lending Act ("TILA") to "assure meaningful disclosure of credit terms" and gave the Federal Reserve Board authority to administer TILA. *Id.* at 11. Although neither TILA nor the Board had directly addressed the issue, the Board's staff had interpreted TILA's disclosure requirements as requiring only a statement that the "Rule of 78's" would apply – no further explanation was required. *Id.* at 12-13. Based on this interpretation of the statute and regulation, the Court concluded as a matter of law that the lender's failure to explain the Rule was "specifically authorized" by federal law and therefore exempt from CFA liability. *Id.* at 17-18.

This Court in *Jackson* made even clearer that § 10b must be given a broad construction to effectuate the policy of not imposing requirements beyond what is mandated by federal law. In *Jackson*, a used car purchaser brought a CFA claim alleging that Chrysler – as assignee of plaintiff's extended warranty contract – should be held liable for the dealership's alleged misrepresentations regarding the price for the contract. 197 Ill. 2d at 40-43. Chrysler asserted a § 10b defense, claiming that, because it had not violated TILA, its actions were "specifically

authorized" by federal law. *Id.* at 43. This Court agreed that Chrysler "complied with the disclosure requirements of TILA by not violating its obligations under the Act." *Id.* at 47. The Court expressed concern that, "[i]f an assignee were liable under the Consumer Fraud Act, though exempt from liability under TILA, it would impose disclosure requirements on assignees beyond those mandated by federal law." *Id.* at 49-50. Based on this concern, the Court held that Chrysler had a complete defense under § 10b, ruling that, as long as a creditor "*complied with* its obligations under TILA," the creditor's conduct satisfied the requirements of § 10b. 197 Ill. 2d at 47 (emphasis added); *see also Jarvis*, 201 Ill. 2d at 89-90 (same); *Weatherman v. Gary-Wheaton Bank of Fox Valley*, 186 Ill. 2d 472, 488 (1999) (same).

These holdings apply here. Congress enacted two laws – the FTC Act and the Labeling Act – that govern cigarette labeling and advertising. By the FTC Act, Congress provided the FTC with the power to regulate advertising generally. 15 U.S.C. § 41 *et seq.* By the Labeling Act, Congress mandated the precise health warnings that must appear on all cigarette packages and advertising, and "vested . . . authority in the FTC" to enact "additional targeted regulations of cigarette advertising" beyond those warnings. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001). Pursuant to that authority, the FTC has addressed precisely how cigarette manufacturers may communicate with consumers about tar and nicotine levels and has specifically considered and allowed the use of the descriptors at issue here. *See supra* at II.A. In view of PM USA's undisputed compliance with federal law, § 10b's liability exemption applies.

The circuit court rejected PM USA's § 10b defense on the ground that "[n]o regulatory body has ever *required* (or even specifically approved) the use of these terms by Philip Morris." C. 43414 (emphasis added). But that is the wrong legal standard. This Court has never limited § 10b to situations where the conduct in question was *required* by federal law. Nor does § 10b require proof that a federal agency "specifically approved" the defendant's conduct. Rather, as this Court has repeatedly held, it is enough that the defendant can show that it *complied* with

federal law. *See, e.g., Jackson*, 197 Ill. 2d at 49-50; *Jarvis*, 201 Ill. 2d at 89-90; *Weatherman*, 186 Ill. 2d at 488.

In any event, even if § 10b required proof that the FTC "specifically approved" PM USA's conduct, that test would be met here. Indeed, the facts are sufficient to satisfy the standard suggested by the concurring opinion in *Jackson*. *See* 197 Ill. 2d at 58-60 (Kilbride, J., concurring) (rejecting majority view that mere "compliance" with regulatory scheme, by itself, is sufficient). As this Court is well aware, regulatory agencies use a wide array of tools other than formal regulations to control industry conduct. *See Lanter*, 114 Ill. 2d at 12-14 (agency staff interpretation sufficient); *see also* K.C. Davis, *Administrative Law & Government* at 283 (2d ed. 1975). Over the years, the FTC has used consent orders, advisory opinions, threatened regulation, reports to Congress, and investigations to regulate what cigarette manufacturers should disclose about tar and nicotine. *See supra* at II.A. The FTC has found that one especially effective method of regulation is to bring an enforcement action against one company to announce to an entire industry what behavior is and is not authorized – as the FTC did in its 1971 and 1994 consent decrees when it explained the circumstances under which cigarette manufacturers could use "low tar" descriptors. *See, e.g.*, A. Aman & W. Mayton, *Administrative Law* § 9.4.5. (West 1993); S. Kanwit, *Federal Trade Commission* § 25.01 (1995); C. Koch, *Administrative Law & Practice* § 5.43 (1997); *see also* R. 6332-35 (Peterman); *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[A]djudicated cases may and do . . . serve as vehicles for the formation of agency policies, which are applied and announced therein."). The FTC itself considers such conduct to be "regulatory activity." *See, e.g.*, Group 19(6) at 13; Group 19(4) at 17-19; Group 19(7) at 1.

Here, the FTC itself created the test by which PM USA was to measure tar and nicotine yields, mandated that the FTC Method be the exclusive basis for tar and nicotine disclosures, and entered into consent decrees that clearly explained the circumstances under which "low tar"

descriptors would be considered substantiated and therefore not deceptive. *See supra* at II.A. Under the FTC's clearly articulated policy and within the meaning of §10b, PM USA was "specifically authorized" to use those terms, without fear of the FTC deeming them "deceptive" or "unfair." Thus, regardless of the standard applied, PM USA's use of the descriptors satisfied the requirements of § 10b, and plaintiffs' CFA claims were therefore barred as a matter of law.

b. Federal Law "Specifically Authorized" PM USA Not To Make Additional Disclaimers

CFA § 10b applies here for another reason as well. The circuit court based its judgment in part on the conclusion that PM USA deceptively *failed to disclose* the health risks of smoking Lights. *See* C. 43384. But in the Labeling Act, Congress explicitly excused PM USA from providing the kind of health and safety disclosures contemplated by the circuit court.

The Labeling Act requires cigarette manufacturers to include a specified health warning on every pack of cigarettes sold in the United States. 15 U.S.C. § 1333. Congress deemed this warning to be "sufficient," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 n.9 (1996), and expressly exempted cigarette manufacturers from any state-law duties to make additional disclosures. *See* 15 U.S.C. § 1334(b); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992); *see supra* at p.47 (Congress' rejection of compensation warning).

Given the Labeling Act, PM USA cannot be held liable under the CFA for failing to provide additional disclosures with respect to health and safety issues relating to Lights. Once again, *Lanier* and *Jackson* are dispositive. In *Lanier*, the Federal Reserve Board advised lenders that they were not required to disclose information beyond the mere fact that they were using the Rule of 78's. 114 Ill. 2d at 12-13. This Court held that the CFA could not be used to impose disclosure requirements that the federal government had declined to impose. *Id.* at 18. Similarly, in *Jackson*, the court held that plaintiffs' claims were barred because they were an impermissible attempt to "extend[] disclosure requirements beyond what is mandated by federal law." 197 Ill. 2d at 49; *see also Hill*, 329 Ill. App. 3d at 713. The same analysis applies here.

Congress relieved PM USA of any obligation to disclose information beyond the warnings specified by Congress. Under this Court's decisions in *Lanier* and *Jackson*, the CFA cannot be used to impose disclosure requirements that Congress refused to enact.

c. The Circuit Court's Reliance On The UDTPA Is Similarly Barred

The circuit court also alternatively – and summarily – justified its award of billions in damages on the ground that PM USA's conduct had been "unfair" in violation of the UDTPA. C. 43384, 43406-07, 43418-19. Like § 10b, the UDTPA does not apply to any conduct that is in "compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency." 815 ILCS 510/4. Like § 10b, this provision bars liability here.

In any event, the circuit court failed to provide any basis for its conclusion that PM USA's conduct was "unfair" under the UDTPA. *See* C. 43406-07. Under Illinois law, such a "bare assertion of unfairness without describing in what manner the lack of disclosures either violate public policy or are oppressive is insufficient" to state a claim. *Robinson*, 201 Ill. 2d at 421. Such a conclusory finding of "unfairness" is also unconstitutionally vague and violates due process. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Furthermore, a violation of the UDTPA can serve as a basis for damages only if a plaintiff also satisfies the causation and injury requirements of the CFA – requirements that plaintiffs failed to meet. *See* 815 ILCS 510/3.

* * *

Finally, any contrary construction of CFA §10b or 815 ILCS 510/4 that would render these provisions unavailable here, despite their clarity, not only would constitute legal error, but would violate PM USA's due process right to notice of what Illinois law permits and prohibits. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964) (application of new construction of state statute violated due process).

C. Express Preemption Bars Plaintiffs' Claims

Federal law also expressly preempts plaintiffs' claims. In the Labeling Act, Congress included an express preemption provision to prevent "the chaos created by a multiplicity of conflicting [cigarette advertising] regulations," *Reilly*, 533 U.S. at 596:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). The U.S. Supreme Court has held that the Labeling Act's preemption provision bars state-law damages actions alleging that a defendant "should have provided additional, or more clearly stated warnings" about smoking and health issues. *Cipollone*, 505 U.S. at 524; *see also Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 337-40 (1996) (discussing *Cipollone*). The Labeling Act also preempts deception claims that PM USA's advertising somehow "neutralized" or undermined the federally mandated warning label. *Cipollone*, 505 U.S. at 527-28.[26] In other words, claims that PM USA's advertising or promotion "tend[ed] to minimize the health hazards associated with smoking," "downplay the dangers of smoking," or "negate or disclaim" the mandated warning labels also are expressly preempted. *Id.* at 527.

Both bases for preemption apply here. *First*, plaintiffs' allegations that PM USA failed to warn or concealed information are preempted because they amount to claims that PM USA should have supplied different warnings from those specified by Congress. Indeed, plaintiffs themselves implicitly conceded that such allegations were preempted when they purported to drop them in response to PM USA's summary judgment motion. *See* C. 17123-255; C. 17942-43, 17951-57; C. 20753. Yet, at trial, plaintiffs reasserted and relied on those allegations, and the

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[26] *See also Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 840 (W.D. Ky. 1999) ("neutralization" claims preempted); *Appavoo v. Philip Morris Inc.*, 1998 WL 440036, at *3 (N.Y. Sup. Ct. July 24, 1998) (claims "that defendants used advertising to neutralize the effect of warning labels" are preempted); *Geiger v. Am. Tobacco Co.*, 674 N.Y.S.2d 775, 776 (N.Y. Sup. Ct. 1998) (claims based on "neutralization through advertising of Federally-mandated warnings" are preempted); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997) (consumer fraud act claims that statements in advertising "diminish[] the impact of the federal warnings" are preempted).

circuit court impermissibly awarded damages based on them. For example, over PM USA's objection, the court admitted testimony that before 2002, PM USA had not disclosed information about compensation and actual tar and nicotine yields. *See* R. 2385-88 (Farone); R. 4144-46 (Reynolds); R. 3378-83 (Fruth). The Court based its judgment on this failure to disclose, stating that *"it was not until the fall of 2002 that [PM USA] disseminated this knowledge."* C. 43401 (emphasis added); *see also* C. 43393, 43403. Furthermore, the court imposed liability in part because PM USA did "not state" to consumers that the tar of Lights on a per milligram basis was higher in certain carcinogens and more mutagenic than the tar of full flavor cigarettes. *See* C. 43383-84. Finally, the court based its damages assessment on a calculation by plaintiffs' expert, Dr. Harris, that assumed that PM USA had a duty to warn consumers about mutagenicity and carcinogen levels. *See* R. 6049-50.

Federal courts nationwide have rejected similar failure to disclose[27] and fraudulent concealment[28] allegations as preempted by the Labeling Act. Indeed, preemption applies even where a plaintiff alleges that a tobacco company concealed information specific to particular kinds of cigarettes, such as Lights. *See, e.g., Brown v. Philip Morris Inc.*, 250 F.3d 789, 794, 798 (3d Cir. 2001) (menthol cigarettes). On its face, the judgment here predicated liability directly on PM USA's alleged failure to disclose – liability barred by the Labeling Act and preemption.

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[27] *See, e.g., Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 842 (8th Cir. 2001); *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 348 (6th Cir. 2000); *Pennington v. Vistron Corp.*, 876 F.2d 414, 421 (5th Cir. 1989).

[28] *See, e.g., Glassner*, 223 F.3d at 349 ("claims of fraud based on fraudulent misrepresentation and concealment are preempted to the extent that they are predicated on a duty to issue additional or more clearly stated warnings through advertising and promotion"); *see also Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996); *Grinnell*, 951 S.W.2d at 440; *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996); *but see Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 2d 1515 (D. Kan. 1995), *on appeal*, No. 02-3201 (10th Cir.).

Second, plaintiffs' deception claims based on PM USA's use of the descriptors "light" and "lowered tar and nicotine" also were expressly preempted because they were essentially claims that the descriptors "neutralized" the mandated warnings. Plaintiffs' experts testified that the terms "lights" and "lowered tar and nicotine" caused smokers to minimize the risks of smoking.[29] In its judgment, the court concluded, without any analysis, that such a claim was not a "neutralization" claim. C. 43410. But that was improperly elevating form over substance. Regardless of how it chose to characterize plaintiffs' claims, the court imposed massive liability based on its finding that PM USA's use of descriptors minimized the dangers of smoking Lights. C. 43387-88, 43391.

In re Tobacco Cases II, 2002 WL 31628641 (Cal. Super. Ct. Nov. 22, 2002), *on appeal*, D-043025 (Cal. App. Ct.), supports the application of preemption here. There, as here, the plaintiffs' allegations boiled down to a claim that a cigarette manufacturer had deceptively marketed light cigarettes by failing to warn about "compensation" and that descriptors such as "lights" effectively "neutralized" the federally mandated warnings. Because the plaintiffs' claims were simply an amalgam of failure to warn and "neutralization" claims, the court held that they were preempted. *Id.* at 14. Based on the same reasoning, a federal court also recently held that the Labeling Act preempts claims based on "light" and "low tar" descriptors. *Newton v. R.J. Reynolds Tobacco Co.*, No. C 02-1415, slip op. at 12-13 (N.D. Cal. 2003) (A. 463).

D. Conflict Preemption Bars Plaintiffs' Claims

Plaintiffs' claims also are barred by the doctrine of conflict preemption. Conflict preemption bars any state-law claim that "stands as an obstacle to the accomplishment and

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[29] *See* R. 2396-97 (Farone) (terms "lights" and "lowered tar and nicotine" were intended to communicate reduced risk and safer cigarettes); R. 4666-67 (Cohen) ("even though that warning appears . . . lowered tar and light on a cigarette package . . . would lead to the same, virtually inescapable conclusion that a cigarette is substantially safer").

execution of the full purposes and objectives of Congress or [a] federal agency." *General Motors Corp. v. Abrams*, 897 F.2d 34, 40 (2d Cir. 1990).

In *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the U.S. Supreme Court held that conflict preemption precluded a state-law design-defect suit against a car manufacturer for failing to install airbags. *Id.* at 874-86. The Department of Transportation ("DOT") had considered and rejected a regulation that would have required airbags in all cars. The Court concluded that the lawsuit posed "an obstacle to" the DOT's deliberate policy decision not to require airbags and therefore was preempted. *Id.* at 881. This Court applied similar reasoning in *Orman v. Charles Schwab & Co.*, 179 Ill. 2d 282, 289-92 (1997), where securities brokers were sued by their customers for retaining "order flow payments" from the firms the brokers used to execute customers' orders. This Court found that the customers' claims were preempted because the SEC had decided not to require brokers to pass on such payments to their customers.

These principles apply here. As discussed above, the FTC created the FTC Method and determined that its tar and nicotine measurements should be broadly distributed to the public. Group 8(22); Group 2(3) at 1. To provide the public with additional information on the relative rankings of cigarettes by yield, the FTC approved the use of such terms as "lights" and "lowered tar and nicotine" so long as the terms are substantiated by the FTC Method. Group 14(3) at 2-3; Group 16(5) at 4. The FTC's policy judgments were the result of careful, deliberate decision making. *See, e.g.*, R. 6388, 6424-26, 6431-35, 6495-6521 (PM USA's expert Peterman).

The circuit court's judgment strikes at the heart of the FTC's policies and objectives. The court found PM USA liable under state law for using the type of descriptive terms that the FTC specifically authorized PM USA to use. C. 43395. Furthermore, the court found PM USA liable under state law for failing to make additional disclosures that would tell smokers, in effect, not to rely on the very FTC Method results that the FTC was publicly promoting to smokers. C. 43383-84, 43401. There is simply no question that, by imposing liability for PM USA's conduct, the

judgment stands in direct conflict with, and as an "obstacle to," the FTC's judgments. *See, e.g.*, R. 6343-48 (Peterman).

The circuit court refused to find conflict preemption on the ground that the FTC did not use formal rulemaking in these areas. *See* C. 43412. Conflict preemption applies, however, whenever there is a conflict with federal *policy* – whether or not the policy is embodied in a formal regulation. *In re Tak Communications, Inc.*, 138 B.R. 568, 578 (W.D. Wis. 1992) ("[t]hat the policy was not created through rulemaking procedures does not diminish its force of law" for preemption purposes) (collecting cases).[30] As made clear in *Geier* and *Orman*, even an agency's decision *not* to adopt a regulation may suffice. *See Geier*, 529 U.S. at 879; *Orman*, 179 Ill. 2d at 295.

If anything, this case is more compelling than *Geier* and *Orman*, because the FTC has expressly stated that lawsuits such as this one would interfere with the FTC's policies. In 1988, Congress considered amending the Labeling Act to permit state-law actions addressing, among other things, disclosure of tar and nicotine yields. *See* Group 3(1)-(6); R. 6357-71 (Peterman). In response, the FTC warned that imposition of liability for communications of tar and nicotine content would create a "very real possibilit[y]" of an "irreconcilable conflict" with FTC policy. Group 3(6) at 8; *see also* Group 3(4) at 1, 6-7; R. 6357-72 (Peterman). Congress did not enact the amendment.

In rejecting conflict preemption, the circuit court relied on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), *see* C. 43412, but that case is distinguishable. There, the U.S. Supreme Court merely found that the Coast Guard's failure to adopt regulations requiring propeller guards did

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[30] *See also People v. Teledyne, Inc.*, 233 Ill. App. 3d 495 (3d Dist. 1992) (consent decree preempted state law); *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994) ("[W]e hold that when the EPA . . . enters into a consent order, that order will also preempt conflicting state regulation."); *San Francisco Police Officers' Assoc. v. City & Cty. of San Francisco*, 812 F.2d 1125, 1129 (9th Cir. 1987) (state law that "conflicts with the operation of a consent decree . . . is void under the Supremacy Clause"); *General Motors*, 897 F.2d at 39 (consent decree gives rise to preemption).

not rise to the level of a federal determination that state suits should be barred. 537 U.S. at 64-68. The Coast Guard's decision essentially left in place *existing* state regulations, which at the time were known to be inconsistent and conflicting. Here, the undisputed history reveals that the federal government has been solely responsible for regulating tar and nicotine testing and disclosure for decades, with no state regulation at all. Pursuant to its authority, the FTC has actively controlled and encouraged the conduct at issue here and has even informed Congress that state suits such as this one would interfere with its regulatory objectives. *See* Group 3(6) at 8.

The circuit court also refused to apply conflict preemption on the ground that plaintiffs' claims "are not based upon any challenge to the FTC machine measuring procedures." C. 43413. But at trial plaintiffs directly attacked the FTC Method as inadequate to measure human intake of tar and nicotine.[31] The court attempted to explain away such attacks as "only relevant to the extent Philip Morris has used these lower FTC machine measurements as an attempted justification for the use of its fraudulent descriptors." C. 43413. That, however, is precisely one of the reasons why plaintiffs' claims are preempted. As explained above, the FTC repeatedly addressed the question of whether the descriptors at issue here are deceptive and should be banned. The FTC determined repeatedly that, as a matter of federal policy, they are neither deceptive nor unfair because they are substantiated by the FTC Method. Group 14(3) at 2-3; Group 16(5) at 4; R. 6341-50 (Peterman). In finding that the FTC Method was not adequate substantiation – and that the descriptors were misleading – the court again created an inescapable conflict with FTC policy.

Ultimately, plaintiffs challenged the FTC Method because they did not even attempt to prove that the descriptors caused any consumer deception that was *separate* from any deception caused by the FTC Method itself. Indeed, Price testified that she chose Cambridge Lights based

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[31] *See, e.g.*, R. 2375 (Farone) ("the FTC test doesn't give a fair comparison of the yield that one is actually going to get"); R. 4971-73 (Cialdini); R. 3048-49, 3055-56 (Benowitz); R. 4258-60 (Burns).

on the FTC Method tar and nicotine numbers. R. 5714. Thus, Price's alleged confusion was caused by FTC Method results, not PM USA's descriptors – a distinction that plaintiffs and the circuit court simply ignored. Plaintiffs' attack on PM USA's statements is inextricably intertwined with attacks on the FTC Method itself and therefore preempted.

E. The First Amendment Bars Plaintiffs' Claims

Under the First Amendment to the U.S. Constitution and Ill. Const. art. 1, §4, the government has the right to ban commercial speech only if it is "inherently misleading." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). A ban is *not* permissible if the speech in question is only "potentially misleading" and there are less restrictive means available – such as requiring "additional information, warnings, [or] disclaimers" – that would prevent consumers from being misled. *See Va. State Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748, 772 n.24 (1976); *see generally Vuagniaux v. Dep't of Prof'l. Regulation*, 2003 WL 22725557 (Ill. Nov. 20, 2003).

Here, as discussed above, the FTC has repeatedly concluded that low tar descriptors such as "lights" and "lowered tar and nicotine" are not deceptive. *See supra* at II.A. If misleading at all, such descriptors would fall into the category of "potentially misleading" commercial speech – that is, speech that may mislead some consumers, but not others. Thus, use of the descriptors could not be banned if less restrictive means are available to prevent consumers from being misled, such as the provision of additional information or warnings. Plaintiffs have not satisfied their burden of showing that such less restrictive means would be ineffective. Moreover, it was exclusively the province of the federal government to determine whether any additional warnings or disclaimers were necessary. As described above, Congress decided not to impose any additional labeling requirements on light cigarettes. *See supra* at II.A. Nor has the FTC required any additional disclaimers in lights advertising. *See, e.g.*, R. 6321-22, 6431-33 (PM USA's expert Peterman). Given these undisputed facts, the imposition of massive monetary liability –

which is tantamount to a ban on the descriptors – is not narrowly tailored as a matter of law and cannot survive constitutional scrutiny. *Cf. New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

III. PLAINTIFFS FAILED TO ESTABLISH THE CLAIMS OF ANY CLASS MEMBER

Section I above demonstrates that allowing this case to proceed to judgment as a class action violated the Illinois class action statute, the CFA's substantive requirements, and state and federal due process. Section II shows that plaintiffs' claims are barred as a result of the comprehensive federal scheme governing tar and nicotine disclosures. This section demonstrates that the circuit court erred in entering judgment for the class representatives – and all other class members – because plaintiffs failed to prove specific elements of a CFA claim (*e.g.*, deception, causation, and injury). The circuit court's rulings on such issues do not survive scrutiny under a "manifest weight of the evidence" standard. *See Kalata v. Anheuser-Busch Co.*, 144 Ill. 2d 425, 433 (1991). Moreover, because the court adopted plaintiffs' proposed findings of fact *verbatim*, this Court should "scrutinize the record with greater care in determining that the findings are supported." *Shapiro v. Regional Bd. of Sch. Trustees*, 116 Ill. App. 3d 397, 404 (1st Dist. 1983); *see also PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1267 n.4 (7th Cir. 1995) ("The action does, however, cause us some pause where, as here, the court changed nothing in a party's submissions and even repeated that party's typographical errors. . . . [I]n these circumstances, [the trial court's findings] require[] a closer and harder look.").

As a threshold matter (and at the very least), PM USA is entitled to a new trial because the circuit court applied the preponderance of the evidence standard instead of the clear and convincing standard. This Court has long recognized that common law fraud claims require proof by clear and convincing evidence. *See, e.g., McKennan v. Mickelberry*, 242 Ill. 117, 134 (1909); *see also Cintuc, Inc. v. Kozubowski*, 230 Ill. App. 3d 969, 974 (1st Dist. 1992). As the Second District has recognized, there is no reason to treat statutory fraud claims differently. *Munjal v. Baird & Warner, Inc.*, 138 Ill. App. 3d 172, 183 (2d Dist. 1985) (applying clear and convincing

standard); *but see, e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269, 291 (5th Dist. 2001) (applying preponderance standard), *appeal allowed*, 201 Ill. 2d 560 (2002).

A. The Class Representatives Did Not Prove Their Individual Claims

1. The Class Representatives Failed To Prove That They Did Not Receive Lower Tar And Nicotine

Neither class representative proved that he or she failed to receive what PM USA purportedly promised – lower tar and nicotine. As plaintiffs' expert Dr. Benowitz conceded, the only way to determine whether an individual failed to receive lower tar and nicotine was to conduct a "biomarker" test measuring nicotine levels in blood. R. 3105; R. 3260. No such test was performed on Price or Fruth (or any other class member). Indeed, both Price and Fruth conceded that they could not say that they had failed to receive lower tar and nicotine. *See supra* at 8-10.

A similar problem barred the CFA claim as a matter of law in *Kelly v. Sears Roebuck & Co.*, 308 Ill. App. 3d 633 (1st Dist. 1999). In *Kelly*, the plaintiff brought a class action alleging that Sears had fraudulently sold "batteries to customers as if they were new without disclosing its practice of intermingling new and used batteries." *Id.* at 635. The plaintiff, however, did not allege that the battery that he purchased was used, although he "believed" that "probably" to be the case. *Id.* at 642. The court rejected as a matter of law the plaintiff's contention that "*all* of the batteries Sears sold are defective because *some* of them may have been used." *Id.* at 644 (emphases in original). The court was unwilling to allow the *possibility* of defect to give rise to a damage claim by every purchaser when some purchasers in fact received new batteries. *Id.* Here, the class representatives' failure to prove that *they personally* did not receive lower tar and nicotine, as allegedly promised, entitles PM USA to judgment.

2. The Class Representatives Failed To Prove That Lights Were More Dangerous

The circuit court also based its judgment and damages award in part on the conclusion that Lights "are actually more harmful and more hazardous than their regular counterparts." C. 43397. To support its "more harmful" conclusion, the court cited evidence that compared the tars of Lights and full flavor cigarettes. This evidence, however, made the comparison solely *on a per milligram basis* and not on a per cigarette basis – and thus did not account for the fact that class members who did not fully compensate received fewer milligrams of tar from Lights than from full flavor cigarettes.[32] As already discussed, the record conclusively established that not all smokers compensate fully (or at all). *See supra* at I.A.1. Because there was no proof that Price or Fruth compensated fully, there was no proof that they were exposed to any higher risk.

Furthermore, this evidence failed to establish a greater risk even as to any class member who did compensate fully. Plaintiffs' evidence established at most that the tar from Lights (on a per milligram basis) (1) was more "mutagenic" (*i.e.*, it caused more damage to the chromosomes of bacteria in a petri dish), *see* C. 43398; and (2) contained higher levels of certain harmful constituents than the tar from full flavor cigarettes. *See* C. 43399. As plaintiffs' own experts admitted, this evidence does not support a conclusion that Lights are more dangerous.

Plaintiffs' evidence on this issue consisted of the testimony of three experts: Drs. Harris, Shields, and Farone. Dr. Harris admitted that, using accepted scientific standards, one *cannot* conclude that Marlboro Lights are more dangerous than their full flavor counterparts:

> Q. And you would agree with me, would you not, that statistically significant changes in the composition of tobacco smoke or particular

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[32] "Per milligram of tar" means that, under plaintiffs' theory, *each milligram* of tar in Marlboro Lights would be more mutagenic than each milligram of tar in a full flavor Marlboro. *See* R. 5331-32 (plaintiffs' expert Shields). Such a comparison proves nothing about whether Marlboro Lights are more mutagenic on a *per cigarette* basis. *See* R. 5486-87 (Shields). Even if its tar were more mutagenic, a cigarette as a whole could expose a smoker to less mutagens if the smoker is exposed to less tar overall. R. 2756 (plaintiffs' expert Farone). Thus, even accepting plaintiffs' "more dangerous" theory, it raises individual issues unsuited for class treatment.

constituents in the smoke do not necessarily translate into a change in disease, right?

A. *No, they do not necessarily translate into disease.*

* * *

Q. . . . [Y]our calculations don't prove that Marlboro Lights are more harmful to human health than Marlboro Reds; correct?

A. Based on the standards of evidence scientists would use to apply to the word prove, no, they don't show that.

Q. *. . . You do not believe that it has been scientifically established that smoking Marlboro Lights is more dangerous than smoking Marlboros, do you?*

A. *Not scientifically established using the standards that scientists would use.*

R. 5192-93 (emphases added). Dr. Harris' concession alone precluded any finding that any class member suffered an increased risk of disease from Lights. Because his testimony did not link tar composition to disease risk, his testimony was irrelevant and provided no support for the circuit court's finding that Lights were "more harmful." C. 43397.

Another of plaintiffs' experts, Dr. Shields, testified that the screening test for mutagenicity can predict only whether a substance may be a carcinogen *in animals* and that, to assess the risk in humans, other tests are necessary. *See* R. 5276-81, 5288-89. Dr. Shields' admissions are confirmed by the *Reference Manual on Scientific Evidence*, which states that "determinations of human toxicity based on in vitro studies" – such as mutagenicity tests – "usually are not considered appropriate." *Reference Manual On Scientific Evidence* at 411 (2000). Courts across the country have similarly recognized that in vitro testing alone cannot establish disease causation in humans.[33] Indeed, even NCI Monograph 13 – upon which plaintiffs

[33] *See, e.g., Lynch v. Merrell-Nat'l Labs.*, 830 F.2d 1190, 1194 (1st Cir. 1987) (in vitro studies "do not have the capability of proving causation in human beings in the absence of any confirmatory epidemiological data"); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 830 (D.C. Cir. 1988) (in vitro studies "alone do not provide a satisfactory basis for opining about causation in the human context"); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 730 (Tex. 1997) ("*in vitro* studies . . . prove[] nothing about causation without other scientific evidence") (quotation omitted); *Wade-*

and their experts relied extensively throughout trial – does not conclude that lower yield cigarettes are 'more harmful' than other cigarettes. R. 2783 (Farone); PX 14 (Monograph 13). Thus, because Dr. Shields' testimony failed to link mutagenicity to disease risk, his testimony was also irrelevant and provided no support for the court's "more harmful" finding.

Finally, plaintiffs' only other expert on this issue, Dr. Farone, initially suggested that Lights were more harmful than their full flavor counterparts, R. 2536-37, but he later conceded that there is no scientifically established link between increased mutagenicity and increased harm: "*If you have a mutation, you have an increase in mutations, but that doesn't mean there's an increase in measurable disease, and so that's where the thing falls apart.*" R. 12121 (emphasis added); *see also* R. 12098-99 (agreeing that relationship between mutagenicity and disease "has not been established" and that mutagenicity "does not necessarily translate into a measurable increase in risk"); R. 2761 (a higher mutagenicity score "doesn't predict cancer in humans necessarily").[34] Thus, Dr. Farone's own later admissions demonstrated that any conclusion that Lights were "more harmful" lacked scientific foundation because there is no accepted scientific link between mutagenicity and disease risk. His testimony therefore also was irrelevant and his opinion on whether Lights were more harmful should have been excluded under the *Donaldson* test. *See Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 76-77 (2002).

Greaux v. Whitehall Labs., Inc., 874 F. Supp. 1441, 1483 (D.V.I. 1994) ("*in vitro* animal test data are unreliable predictors of causation in humans").

[34] As Dr. Farone explained, one cannot draw conclusions about human disease from mutagenicity testing because it is only a pre-screening test using bacteria in a petri dish. *See* R. 2759-60. This type of test is the first of several levels of toxicity testing performed on a substance, and its results do not allow conclusions about what effect the substance will have on humans. *See* R. 2759; *see also* R. 5276-79 (Shields). Indeed, in other types of tests – including different mutagenicity tests and tests using animals – lower yield cigarettes demonstrate less biological activity (less mutagenicity and less animal tumors) compared to higher yield cigarettes. *See* R. 5413-15, 5442 (Shields); R. 8966-71, 10564-74 (PM USA's expert Carchman). Dr. Farone also acknowledged that increased levels of certain constituents in smoke do not prove an increased risk of harm. *See* R. 12100, 12121.

In short, there is no proper support for the circuit court's finding that Lights are more dangerous than full flavor cigarettes. Plaintiffs' own experts acknowledged that "using the standards that scientists would use," it has not been scientifically established that light cigarettes are more dangerous.[35]

3. Class Representative Price Did Not Prove Proximate Causation Or Materiality

There was no proof that PM USA's use of the words "lights" and "lowered tar and nicotine" was a proximate cause of Price's purchases. To the contrary, she continued purchasing Lights even after learning that Lights may be "more dangerous" than full flavor cigarettes. R. 5718-19, 5731 (Price). This undisputed fact proved that the alleged deception was not a "but for" factor in her decision to purchase Lights. *See, e.g., Martin*, 163 Ill. 2d at 60 (plaintiffs must show that they "would not have engaged in the transaction had the other party made truthful statements").

In *Bass v. Prime Cable of Chicago, Inc.*, 284 Ill. App. 3d 116 (1st Dist. 1996), a consumer brought a class action under the CFA, alleging that the cable provider, by promising a free cable guide, had defrauded her and others into buying cable. After initially living up to its promise, the cable provider began charging for the guide. The plaintiff, however, "[a]fter learning that the cable guide would no longer be provided free of charge . . . *continued to use defendant's cable service.*" *Id.* at 127 (emphasis added). The court granted judgment for the cable provider because the plaintiff's conduct demonstrated that any misrepresentation was not material to her decision to purchase cable: "These facts illustrate that there was no genuine issue of material fact with respect to the Consumer Fraud Act requirement of a material misleading

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[35] Citing Dr. Shields, the judgment also suggested that Lights are more dangerous because they "have contributed to the dramatic rise in adenocarcinoma cancer rates." C. 43399-400. Dr. Shields, however, conceded that the current "medical consensus" is that the link between adenocarcinoma rates and light cigarettes is merely a "postul[ation]." R. 5473-75.

fact." *Id.* Here, as in *Bass*, the conduct of Price (and the majority of other class members who testified) in continuing to purchase Lights even after learning about the alleged deception conclusively proves that the deception was not a material cause of their purchasing decisions.

B. Plaintiffs Failed To Establish The Claims Of Other Class Members

As discussed above, the circuit court entered judgment for every class member without making any factual distinction between class members. The very reason this case should never have been certified – the predominance of individual issues and the inability to resolve those issues in an aggregate proceeding – is the root cause of plaintiffs' failure to prove that every class member is entitled to recovery. For the reasons discussed above in connection with predominance, plaintiffs' claims raise numerous individual issues that simply could not be – and were not – proven by plaintiffs' "generic" expert testimony. *See supra* at I.A. Accordingly, if this Court upholds the certification of the class, it should enter judgment for PM USA.

IV. THE CIRCUIT COURT'S DAMAGE AWARD IS LEGALLY AND FACTUALLY UNSUPPORTABLE

The staggering $10.1 billion judgment should be vacated because the damages are legally and factually unsupportable. The circuit court applied the wrong legal standard in awarding billions of dollars for a fictitious "economic loss" and then compounded its error by including within the compensatory damage award billions for claims barred by the statute of limitations and billions in unlawful prejudgment interest. The court further erred in ruling that any unclaimed portion of the compensatory award should be distributed to third parties having nothing to do with the subject matter of this suit. Finally, the court erred in awarding still billions more in punitive damages to the State – an award that was unjustified by any need for punishment or deterrence and unlawfully exceeded PM USA's ability to pay.

A. Plaintiffs' Compensatory Damages Theory Was Legally And Factually Erroneous

With but one exception, the circuit court's compensatory damages award is based on errors of law and should be reviewed de novo. *Beehn*, 321 Ill. App. 3d at 680-81. The one exception is the court's erroneous admission of the survey evidence underlying plaintiffs' damage calculation (*see infra* at IV.A.4.); that issue is subject to review for abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003).

1. The Real-World Evidence Of Value Precluded Any Claim Of "Economic Loss" As A Matter Of Law

To recover under the CFA, a plaintiff must prove actual damages. *See Oliveira*, 201 Ill. 2d at 149. A failure to prove actual damages requires the court to enter judgment for the defendant. *See Martin*, 163 Ill. 2d at 58-59.

Because plaintiffs' sole claim here is "economic loss," damages are "determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true." *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 196 (1989); *see also Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 653-54 (1st Dist. 2001) (applying standard to CFA case). *Gerill* thus requires a straightforward comparison of (1) the market's valuation of Lights before the discovery of the supposed deception (*i.e.*, "the value the property would have had if the representations had been true"); and (2) the market's valuation of Lights after such discovery (*i.e.*, "the actual value of the property sold"). There is no dispute that the first value is the price that class members actually paid for Lights before "discovery" of the alleged deception. R. 6000-03 (Harris). But, as to the second value ("actual value"), the circuit court committed legal error by ignoring the applicable measure of damages. The court improperly disregarded what consumers actually paid for Lights after "discovery" of the alleged deception and instead allowed plaintiffs to substitute a fictitious value divorced from any established fact or marketplace reality. *See infra* at IV.A.2.

Under Illinois law, the *best* evidence of "actual value" is generally "a recent sale of the subject property." *In re Busse*, 124 Ill. App. 3d 433, 440 (1st Dist. 1984). The "price paid in a recent sale" is "the most important factor in determining the present value of property" and "practically conclusive on the issue of value." *Id.*; *see also Munjal*, 138 Ill. App. 3d at 186-87 (demonstrating actual damage by showing that market value decreased after discovery of alleged deception). Here, there was no evidence – absolutely none – that the price of Lights decreased after the alleged deception was discovered. Further, the undisputed fact is that at all times – including during trial – the market price for Lights remained the same as the market price for their full flavor counterparts. *See, e.g.*, R. 6076 (plaintiffs' expert Harris); R. 11137 (PM USA's expert Viscusi). The fact that Lights have always cost the same as full flavor cigarettes – and continued to cost the same even after the alleged deception was revealed – establishes that the alleged deception did not cause any diminution in the value of Lights.

This marketplace evidence was confirmed by the conduct of individual class members. As noted, most class members who testified continued purchasing light cigarettes even *after* learning about the alleged deception – including after learning that Lights may be "more harmful" than other cigarettes. *See supra* at n.3. These class members made a choice between continuing to purchase Lights, switching to a different brand of cigarettes, or stopping smoking altogether. Their purchasing behavior confirms that the economic value of Lights to these class members even after discovery of the alleged deception equaled or exceeded the market price. *See* R. 12288 (Harris). These class members thus suffered no economic loss. R. 12331-37 (Harris) (if willingness to pay equals or exceeds the market price, there is "zero out of pocket loss"); *Sommer v. United Sav. Life Ins. Co.*, 128 Ill. App. 3d 808, 816 (2d Dist. 1984) ("to show injury, plaintiffs must allege facts which show the value of what they received was not equal to the value of what they were promised"); *Small*, 720 N.E.2d at 898 (failure to prove damages where no proof "that the cost of cigarettes was affected by the alleged misrepresentation").

Consider the result if the opposite were true. If Lights had been more expensive, there would be no question but that plaintiffs would have claimed damages equal to the price difference between Lights and full flavor cigarettes. Here, there was no price difference and class members did not pay any premium for reduced tar and nicotine. Of course, *individual* class members may contend that they suffered *some* economic loss by asserting that, absent the deception, they would have quit smoking and not spent any money on cigarettes. However, plaintiffs never asserted such a theory on behalf of anyone, including the class representatives. The reason is clear: such an allegation would raise too many individual issues and preclude class certification.

2. The Court Erred By Allowing Plaintiffs To Replace Real-World Evidence Of Value With A Hypothetical Value

Ignoring settled law on what constitutes "value," the circuit court allowed plaintiffs to sweep aside real-world market values and concoct an artificial "value" instead. Lacking any evidence that the market price of Lights dropped after discovery of the alleged deception, plaintiffs conducted an Internet survey that asked respondents (few, if any, of whom were class members) what they would have paid for Lights under factual circumstances irrelevant to this case. Sitting at their computer keyboards, the respondents were asked to imagine a world in which "real" Marlboro Lights (which "could be more harmful" than full flavor Marlboro cigarettes) were sold alongside a hypothetical Marlboro Lights that tastes and costs "exactly the same" as real Marlboro Lights but delivers "less tar" and nicotine and "is less harmful." PX 74-A at 39-40. Respondents were then told to say how much of a discount they would require before purchasing the "real" Marlboro Lights instead of the "less harmful" version. *Id.* The respondents on average said that they would require a 92.3% discount to purchase real Lights. *See* C. 43403-05; *see also* R. 6035, 6049 (plaintiffs' expert Harris).[36]

[36] The full text of the survey question was: "What is the highest price you would pay for a Marlboro Light cigarette that *could be more harmful* than Marlboro Reds if a Marlboro Lights that delivers less tar and is less harmful or safer than a Marlboro Reds was available at the price you

In adopting plaintiffs' so-called "contingent valuation" approach to damages, R. 6123-24, the circuit court applied the wrong legal standard for measuring damages. Plaintiffs' survey did not measure actual value in the marketplace. Nor did plaintiffs even attempt to prove that their Internet survey could be used to replicate an actual market. Rather, the survey asked respondents how they would react if there were a different product available to them: a hypothetical product "less harmful" to all smokers (regardless of individual smoking behavior) but identical to real-world Lights in taste and every other characteristic. Dr. Harris admitted that the form of the survey question had the effect of reducing the value that respondents would otherwise attribute to the real-world Lights by introducing a hypothetical, superior product in the mix of available alternatives from which the consumer could choose. R. 6112-13.

Furthermore, even if a survey-based approach could *theoretically* generate a market value (it cannot), the Internet survey used here asked the *wrong question* – and therefore unavoidably obtained the *wrong answer*. As already noted, the "actual value" of Lights is the value that they would have had if PM USA had not engaged in the alleged deception. *See Gerill Corp.*, 128 Ill. 2d at 196. Accordingly, the *right* question was how much class members would have paid for Lights in the real world if they had known the alleged "truth" – *i.e.*, that Lights were not less hazardous and "could be more harmful" than full flavor cigarettes. But the survey did not ask this question. R. 5591-94. Rather, the survey asked a fundamentally different question: how much Lights smokers would have paid for Lights if (1) they had known the "truth," *and* (2) were given the option to purchase instead a hypothetical truly safer cigarette (the feasibility of which was not pled and was never proven at trial). Given that non-existent "choice," any reasonable person would be less inclined to purchase the real-world Lights.

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usually pay for Marlboro Lights? (Remember that both Marlboro Lights cigarettes taste exactly the same.)?" *Id.* at 39 (emphasis in original).

The circuit court recognized that plaintiffs' hypothetical cigarette did not exist at the time of the sale, but held that "Philip Morris cannot escape liability in this case from its fraud because of the fact that it never created the product that it promised." C. 43403. That is a *non sequitur*. The issue here is not "escaping liability," but valid proof and the correct measure of damages. Plaintiffs sought economic losses based on the theory that the two alleged misrepresentations ("lights" and "lowered tar and nicotine") caused actual damage. C. 14-15; C. 17143-44. Damages must therefore be based on the impact of *those statements* on the purchase price of Lights. *See Reference Manual On Scientific Evidence* at 307 (2000). As the real-world marketplace evidence demonstrates, those statements had no impact on the price of Lights. R. 6076 (Harris). Plaintiffs therefore suffered no economic loss.

3. Plaintiffs' Alleged Injury Is Inherently Speculative And Not Cognizable Under The CFA

Given the absence of any market evidence of injury and the flaws in plaintiffs' Internet-based approach to damages, the injury alleged by plaintiffs is too speculative to be legally cognizable. Plaintiffs claimed that Lights posed a greater-than-expected risk of future physical injury (to some unknown and unproven degree) and therefore their value must have been diminished. Courts, however, have generally refused to uphold such "diminished value" claims based on amorphous theories of increased risk of personal injury without at least some market evidence that the value of the product has been affected.

For example, in *Verb v. Motorola*, 284 Ill. App. 3d 460 (1st Dist. 1996), the court upheld the dismissal of a CFA claim brought by a putative class of cell phone users who claimed that the radio waves emitted by their cell phones were harmful to health. Like plaintiffs here, the *Verb* plaintiffs expressly disclaimed any recovery for personal injuries. *Id.* at 471. They asserted only "economic loss" in the form of an alleged reduction in their phones' values because of the increased risk of future injury. *Id.* Plaintiffs, however, did not allege any facts to show that the resale value of their phones had been reduced or that they used their phones less frequently. For

this reason, the court held that the plaintiffs' claims for economic loss "constitute[d] conjecture and speculation" and therefore had been properly dismissed as a matter of law. *Id.* Here, as in *Verb*, plaintiffs presented no evidence that the disclosure of the alleged deception in fact reduced or will reduce the market price of Lights. Their claim that the value of Lights was somehow affected by the alleged deception is precisely the kind of "conjecture and speculation" that cannot provide a basis for recovery under the CFA.

To be sure, Illinois courts have upheld certain claims at the pleading stage based on a "diminished value" theory, but only when those claims were based on provable reductions in the market value of a product. *See Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996) (upholding pleadings where plaintiffs alleged that roll over risk of sport utility vehicles had reduced their resale value); *see also Schiffner v. Motorola*, 297 Ill. App. 3d 1099 (1st Dist. 1998) (suggesting that, in contrast to *Verb*, plaintiffs had alleged a concrete reduction in the market value of their cellphones due to the need to limit the duration of calls and out-of-pocket expenditures to modify their phones to avoid the risk). By contrast, where plaintiffs (like plaintiffs here) are unable to show a reduction in the market value of the product, courts in Illinois and elsewhere have deemed such claims to be speculative as a matter of law. *See, e.g., Yu v. IBM Corp.*, 314 Ill. App. 3d 892, 895-97 (1st Dist. 2000) (claim that defective software posed "potential problems" in the future was impermissible "conjecture and speculation"); *Briehl v. General Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999) (diminished value claims based on risks of anti-lock braking systems are "too speculative"); *In re General Motors Type III Door Latch Litigation*, 2001 WL 548755 (N.D. Ill. 2001) (rejecting diminished value theory where defective door latch did not result in any manifested physical or economic injury); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) ("most states would not entertain the sort of theory that plaintiffs press") (collecting cases); *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 561-63 (N.D. 2002) (diminished value claim based on failure to equip cars with braking device is not cognizable)

(collecting cases). These cases recognize that, if adopted, plaintiffs' theory of "economic" harm would radically expand the boundaries of a manufacturer's liability by giving all purchasers of a product posing unexpected risks a cause of action even though the risk has not materialized as an actual injury or had any impact on the product's market value. Never before have the Illinois courts allowed even a remotely comparable award without a showing of a real and palpable injury.[37]

4. The Circuit Court's Damage Award Was Based On Methodology Not Accepted By The Scientific Community

Finally, the circuit court's compensatory damage award also must be reversed because the Internet survey on which it was based lacked scientific validity and was inadmissible under *Donaldson*. *See* 199 Ill. 2d at 76-77. Dr. Harris admitted that his damage calculation was "based entirely" on the Internet survey conducted by Dr. Dennis, R. 6123, a "rebuttal" expert whose report was served two months before trial. Indeed, the survey was entirely litigation-driven and conducted from start to finish all in a span of seven to ten days. R. 5626-28 (Dennis). Throughout the process, plaintiffs' counsel was directly involved in drafting the survey questions. R. 5633-34. During his first four days working on the survey, Dr. Dennis "had somewhere between 40 and 70 telephone conversations" with plaintiffs' counsel about the survey. R. 5627. During these conversations, plaintiffs' counsel suggested different ways of wording questions and Dr. Dennis would draft the questions accordingly. R. 5626-27. After seeing respondents'

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[37] As the Seventh Circuit observed in *Bridgestone*, personal injury lawsuits are enough to ensure that every plaintiff who suffers an injury is fully compensated and that every defendant who causes an injury is forced to internalize the full costs of its conduct. 288 F.3d at 1017. Allowing additional, separate suits for inchoate "economic" injuries would result in "excess compensation" and overdeterrence because a defendant would be forced, through personal injury lawsuits, to pay for 100% of the harm that it caused and then be forced to pay additional "economic" damages to people who never suffer injury. *Id.* at 1017 & n.1. For this reason, "most states would not entertain the sort of theory that plaintiffs press" in this case. *Id.*; *see also Dillon*, 199 Ill. 2d at 506 (only allowing claim for increased risk if plaintiff has present physical injury and can quantify probability of increased risk). Here, where plaintiffs' counsel advertised and now is filing personal injury actions, the problem of excessive compensation (and potential liability) is real and immediate.

answers in an initial test run, plaintiffs' counsel changed the survey. R. 5642. These changes produced the survey answers upon which Dr. Harris relied to calculate $7.1 billion in damages. R. 5605-07 (Dennis); R. 6123 (Harris).

The circuit court adopted plaintiffs' proposed finding that the Internet survey "provide[d] an accurate measure of the damage suffered by the Class members in this case." C. 43404. None of plaintiffs' experts, however, was willing to testify that the Internet survey was "accurate" or "scientifically valid." Even Dr. Harris refused to opine on the scientific validity of the survey; instead, he merely *assumed* that it was valid. R. 6126-27. Dr. Dennis, who conducted the survey, conceded that it failed to measure "the true beliefs that people have" about Lights. R. 5591; *see also* R. 5582; R. 10749-87 (PM USA's expert Mathiowetz) (testifying about survey's lack of validity).

As a matter of both foundation and admissibility under *Donaldson*, plaintiffs had the burden to come forward with evidence that their Internet survey was based on scientifically accepted methodology and yielded valid results. Plaintiffs offered no such evidence. Because the Internet survey was inadmissible, there is no basis for the court's damage award.

B. The Circuit Court's Judgment Impermissibly Awarded Damages For Claims Barred By The Statute Of Limitations

The circuit court's judgment also improperly awarded damages for claims barred by the statute of limitations. *Beehn*, 321 Ill. App. 3d at 680-81 (legal error reviewed de novo). The court awarded plaintiffs damages for purchases made before February 10, 1997, before the three-year limitations period. 815 ILCS 505/10a(e); *see supra* at I.A.6. These pre-limitations purchases account for approximately *$4.9 billion* – over two thirds of the compensatory award. *See* PX 138-J; PX 138-T. As shown above, whether the discovery rule tolls the statute of limitations in this case is an individual issue that precludes class certification here. *See supra* at I.A.6. At the very least, the circuit court's erroneous decision to treat the statute of limitations as

a common issue requires the court to reverse the award of $4.9 billion in damages attributable to purchases before February 10, 1997.[38]

C. The Prejudgment Interest Award Was Legally Erroneous

The circuit court improperly included 5% prejudgment interest – $2.1137 billion – in the compensatory damages award. C. 43406. The court erred as a matter of law in determining that it had the authority to award prejudgment interest on a CFA claim. *Beehn*, 321 Ill. App. 3d at 680-81 (legal error reviewed de novo).

"Generally, prejudgment interest is recoverable only where contracted for or authorized by statute." *Cont'l Cas. Co. v. Commonwealth Edison Co.*, 286 Ill. App. 3d 572, 577 (1st Dist. 1997). Here, the parties did not contract for prejudgment interest, and the CFA does not expressly authorize prejudgment interest. Nor could the court rely on any "equitable" exception to the general rule, because the CFA claim is a statutory claim for damages and thus an action at law for which prejudgment interest is inappropriate. *Id.* at 579 ("Illinois courts have declined to apply the rule governing equitable awards of prejudgment interest to cases at law."); *see also Wilson v. Cherry*, 244 Ill. App. 3d 632, 636-40 (4th Dist. 1993).

The Illinois Interest Act also does not justify the prejudgment interest award. That statute allows for prejudgment interest in five types of cases, none of which applies here. 815 ILCS 205/2; *see Pietka v. Chelco Corp.*, 107 Ill. App. 3d 544, 557 (1st Dist. 1982) (even the Interest Act's provision for prejudgment interest in cases of "unreasonable and vexatious delay of

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[38] Even in the few cases where courts have certified classes of light cigarette smokers, courts often have limited the plaintiffs' claims to purchases occurring within the statutory limitations period. *See Aspinall v. Philip Morris, Cos.*, C.A. No. 98-6002-H, slip op. at 15 (Mass. Super. Ct., Suffolk Cty., Oct. 3, 2001) (A. 416) (limiting class to "purchasers of Marlboro Lights cigarettes in Massachusetts during the four years preceding the filing of this complaint"), *class decertified on appeal*, 2003 WL 21297272 (Mass. App. May 27, 2003) (A. 431), *recon. denied but leave to appeal granted*, No. 02-J-4, slip op. (Mass. App. Aug. 22, 2003) (A. 448); *Marrone v. Philip Morris USA, Inc.*, No. 99-CIV 0954, slip op. at 2 (Ohio Ct. Comm. Pleas Sept. 24, 2003) (two year limitation) (A. 460). The court's decision certifying the class in *Aspinall* was reversed on appeal. The *Marrone* decision is currently on appeal. *See Marrone v. Philip Morris USA, Inc.*, 03CA-0120-M (Ohio Ct. App.).

payment" is inapplicable to "an honest or good faith dispute regarding the existence of a legal obligation" or "the defense of a lawsuit").

In any event, prejudgment interest is permitted only if the amount in controversy is fixed or subject to precise computation. *See, e.g.*, *Boyd v. United Farm Mut. Reins. Co.*, 231 Ill. App. 3d 992, 1001 (5th Dist. 1992). This requirement is not satisfied where the amount of damages is "disputed" and the plaintiff "submitted alternative measures of damages to the circuit court for its consideration." *Alguire v. Walker*, 154 Ill. App. 3d 438, 448 (1st Dist. 1987). That is precisely the case here. Plaintiffs' damages expert, Dr. Harris, offered a series of different and alternative measures of damages – with multi-billion dollar differences between his estimates. R. 6003, 6048-54, 6072-73. The prejudgment interest award, therefore, must be reversed.[39]

D. The Cy Pres Award Was Legally Erroneous

The circuit court ordered that any funds not distributed to class members be given to such diverse and unrelated organizations as 11 law schools, "all domestic violence programs in the State," "all of the Drug Court programs throughout the State," several legal aid organizations, and the Illinois Bar Foundation. C. 43426-27. The court's order was erroneous as a matter of law and at the very least constituted an abuse of discretion. *Beehn*, 321 Ill. App. 3d at 680-81 (legal error reviewed de novo); *Burr v. Brooks*, 83 Ill. 2d 488, 502 (1981) (affirming abuse of discretion review for manner of cy pres distribution). If the judgment is upheld, any unclaimed funds should be returned to PM USA.

First, even if the judgment were otherwise upheld, the calculation of damages still would be undeniably speculative and not the result of any mathematical precision. Under these

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[39] In *Kleczek v. Jorgenson*, 328 Ill. App. 3d 1012, 1025 (4th Dist. 2002), the court assumed, without analysis, that the CFA allowed prejudgment interest as a matter of discretion. For the above reasons, the court's assumption was wrong. (The court there ultimately did not need to reach the issue because it affirmed the denial of prejudgment interest as a matter of discretion.) Here, even if the circuit court had power to award prejudgment interest, given the highly speculative nature of the damages, its award was an abuse of discretion.

conditions, courts have refused to make a cy pres award. *See Mangone v. First USA Bank*, 206 F.R.D. 222, 230 (S.D. Ill. 2001); *Friedman v. Lansdale Parking Auth.*, 1995 WL 141467, at *4 (E.D. Pa. Mar. 31, 1995).

Second, awarding leftover funds to non-parties would not further the interests of class members or PM USA's other consumers. *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308 (9th Cir. 1990) ("Even where *cy pres* is considered, it will be rejected when the proposed distribution fails to provide the 'next best' distribution."). Other pending class actions seek additional billions of dollars from PM USA based on the same alleged conduct. Indeed, class counsel has filed a second "lights" class action against PM USA on behalf of smokers who purchased PM USA's other brands of light cigarettes. *Arnold v. Philip Morris USA*, No. 03-L-570 (Ill. Cir. Ct. May 2, 2003). At the same time, plaintiffs' counsel is representing individual class members in personal injury actions against PM USA (presumably as a result of the advertisements plaintiffs' counsel placed alongside the class notice in this case). *See supra* at I.B. Class counsel even has recently filed a suit on behalf of a single class member against *retailers* of Marlboro Lights, explaining that PM USA was not sued because it "would not be able to satisfy any judgment in Plaintiff's favor." *Squires v. Martin & Bayley, Inc.*, No. 03-L-1491, Compl. at ¶ 48 (Oct. 30, 2003) (A. 477). Thus, counsel expressly acknowledges that PM USA does not have the funds to pay the instant judgment, let alone any additional judgment that counsel may obtain in the other pending cases against PM USA. Accordingly, to the extent there are any leftover funds from the compensatory award in this case, it makes no sense to deplete PM USA's assets and deprive future claimants of recovery (if successful) by distributing the leftover funds to third parties. *See Sulcov v. 2100 Linwood Owners, Inc.*, 696 A.2d 31, 43 (N.J. App. 1997) (returning funds to the defendant because it would benefit class members).

Finally, by requiring that unclaimed funds be distributed to entities that were not injured by the alleged wrongful conduct, the circuit court has levied an additional punishment apart from

the (already excessive) punitive damages award. *See FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993) (awarding unclaimed damages to charities equivalent to awarding punitive damages). As discussed below, a punitive damages award is improper here because it is unwarranted by any need for punishment or deterrence. *See Simer v. Rios*, 661 F.2d 655, 676-77 (7th Cir. 1981) (fluid recovery improper because unnecessary for deterrence). Accordingly, as a matter of Illinois law and state and federal due process, any unclaimed funds should be returned to PM USA.

E. The Punitive Damages Award Was Legally Erroneous

After awarding plaintiffs over $7 billion in "compensatory" damages, the circuit court further awarded a staggering $3 billion in punitive damages, C. 43421-22, by far the largest punitive award in Illinois history. The court awarded all $3 billion to the State of Illinois – or to the class as a fallback, if the State is barred from receiving the award. C. 45749. This Court reviews that award de novo. *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1181 (5th Dist. 2002); *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 436 (2001).

1. Resolution Of The State's Suit Bars The Punitive Award

Irrespective of whether the $3 billion is awarded to the State or the class, the award is barred by *res judicata*. In 1996, Illinois (like most states) sued PM USA and other tobacco companies seeking billions of dollars in damages for alleged wide-ranging misconduct, including essentially the same misconduct alleged by plaintiffs here. Illinois specifically included claims under the CFA and sought compensatory damages, civil penalties, restitution, and disgorgement of profits. DX 4802 (¶¶ 176-93, 216-33, 327-332, Prayer for Relief). In November 1998, Illinois (along with 45 other states) settled all claims by entering into the Master Settlement Agreement or "MSA." *See* DX 4391 at 15.

The State's settlement with PM USA bars the punitive damages award on *res judicata* grounds.[40] *Res judicata* precludes not only relitigation of claims that were actually determined in the prior action, but also all claims that *could have been* determined there. *LaSalle Nat'l Bank v. County Bd. of Sch. Trustees*, 61 Ill. 2d 524, 529 (1975); *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). The doctrine applies where "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of the cause of action, and (3) there is an identity of parties or their privies." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). All three requirements are satisfied here:

Final Judgment: Illinois' suit was resolved by a final judgment on the merits, DX 4803, and the time for any appeals from that judgment has expired. *See Elliott v. LRSL Enters., Inc.*, 226 Ill. App. 3d 724, 727 (2d Dist. 1992).

Identity of Actions: There is a common nexus of operative facts underlying both causes of action because the State, like plaintiffs, asserted CFA claims based on similar allegations.

Identity of Interest: Plaintiffs here are in privity with the State for *res judicata* purposes because plaintiffs seek to vindicate the same asserted societal interest in punishment and deterrence. Illinois courts – including this Court – have repeatedly dismissed actions on *res judicata* grounds after finding that privity existed between private citizens and a branch of the state government. *See, e.g., People ex rel Burris v. Progressive Land Developers*, 151 Ill. 2d 285, 295-97 (1992) (finding privity where attorney general's interests in demonstrating source of charity's assets were adequately represented by private parties).[41]

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[40] In the Circuit Court of Cook County – the court with continuing and exclusive jurisdiction over implementation and enforcement of the MSA – PM USA is challenging the ability of the State to recover the punitive damages award in the event that the circuit court's punitive damages assessment is upheld. *See Illinois v. Philip Morris Inc., et al.*, No. 02 L 423. By agreement of the parties, the court in that case has stayed further proceedings pending the outcome of this appeal.

[41] *See also People ex rel. Hartigan v. Ill. Commerce Comm'n*, 243 Ill. App. 3d 544, 550-51 (1st Dist. 1993) (taxpayer citizen seeking refund of taxes paid for utility rate increase was in privity with government agencies that had already sued to reverse rate increase); *Bd. of Ed. v. Village of*

Thus, as a matter of law, the final judgment in the State's action constitutes *res judicata* and bars the punitive damages award here.

2. The Circuit Court's Three Billion Dollar Award Violates Illinois Law And The U.S. Constitution

Illinois law and the U.S. Constitution limit punitive damages to the minimum amount necessary to punish or deter reprehensible conduct. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003); *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 415-16 (1990). Illinois law also prohibits any punitive award that exceeds a defendant's ability to pay or otherwise threatens the defendant with economic destruction. *See, e.g., Nat'l Bank of Monticello v. Doss*, 141 Ill. App. 3d 1065, 1074 (4th Dist. 1986). The $3 billion punitive award here violates those principles.

a. PM USA's Alleged Misconduct Does Not Warrant The Imposition Of Punitive Damages

This Court has recognized that punitive damages are an extraordinary remedy that can be awarded only for "conduct involving some element of outrage similar to that usually found in crime." *Loitz*, 138 Ill. 2d at 415. The conduct alleged here does not even approach that high standard. As discussed above, *see supra* at II.A., for decades, the consensus view of the public health community, based on established epidemiology, was that lower yield cigarettes were less hazardous than full flavor cigarettes. *See, e.g.*, R. 7970-73, 7976-78, 8052 (PM USA's expert English); Group 8(9) at 2. The public health community believed that the epidemiology inherently took into account compensation. R. 8028-29 (English). Accordingly, despite its awareness that some smokers compensate, the FTC continually encouraged PM USA to disclose

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Northbrook, 295 Ill. App. 3d 909, 918 (1st Dist. 1998) (parents seeking to eliminate traffic congestion to provide greater safety for school children were in privity with the board in its earlier lawsuit seeking damages and an injunction against a property development that would create greater traffic); *see generally Liggett Group Inc. v. Engle*, 853 So. 2d 434, 468 (Fla. App. 2003) (MSA barred punitive award) (review petition pending).

tar and nicotine yields to the public. *See supra* at II.A. PM USA should not be punished for complying with FTC policy. *See, e.g.*, *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993) (punitive damages "improper where a defendant has adhered to" government regulations); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699, 703 n.8 (D. Md. 1993) (same).

When the scientific consensus about low yield cigarettes began to change in the late 1990s, PM USA's actions changed as well. In 1999, PM USA began including information on its website alerting smokers to compensation and the fact that "light" cigarettes may not lower smokers' health risks. *See, e.g.*, R. 9918-20 (PM USA's witness Lund). In November 2000, PM USA also began including in advertisements a disclaimer that "[t]he amount of 'tar' and nicotine you inhale will vary depending on how you smoke the cigarette." DX 3350; R. 9923-25 (Lund). Finally, PM USA has distributed similar information in newspapers nationwide and by placing "onserts" on 135 million packages of low yield cigarettes. R. 9932-38 (Lund); DX 4170; DX 4171; DX 3520; DX 3525. Such actions were voluntary. In short, PM USA's conduct is simply not the type that warrants the imposition of punitive damages.

b. The Punitive Damages Award Cannot Be Justified As Necessary For Punishment Or Deterrence

Nor can the circuit court's $3 billion punitive damages award be justified as necessary for punishment or deterrence. The compensatory damages award alone precludes the need for any further award here. The $7.1 billion compensatory award is the largest in Illinois history and is many times more than the amount of profits PM USA earned from selling Lights in Illinois. *See* DX 3019; R. 6090-91 (plaintiffs' expert Harris); *see also* R. 11220 (PM USA's witness Oramas) (under seal). Where, as here, compensatory damages alone impose a potentially crushing liability, punitive damages are unnecessary for punishment or deterrence and cannot constitutionally be imposed. *See State Farm*, 123 S. Ct. at 1524 (amount of compensatory award must be considered in reviewing excessiveness of punitive award). That is particularly true where PM USA's conduct is already heavily regulated, both by the FTC and the Illinois Attorney

General. The FTC has broad powers to police deceptive cigarette advertising. And the MSA, which is fully enforceable by the Illinois Attorney General, imposes numerous restrictions on PM USA's advertising, marketing, and promotion. *See* DX 4391 at §§ III, VII. The prospect of continuing enforcement by both the Attorney General and the FTC reduces even further the need for additional deterrence. In short, no legitimate purpose is served by the $3 billion award.

c. The Punitive Damages Award Exceeds PM USA's Ability To Pay

The punitive damages award must also be reversed because it exceeds PM USA's ability to pay. *See Doss*, 141 Ill. App. 3d at 1074. Under Illinois law, ability to pay is determined by net worth. *See, e.g., Fopay v. Noveroske*, 31 Ill. App. 3d 182, 200 (5th Dist. 1975). Net worth "can be determined only through the objective application of generally accepted accounting principles." *Engle*, 853 So. 2d at 457 n.28; *see also Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1200 n.3 (11th Cir. 2001); *Southwest Whey, Inc. v. Nutrition 101, Inc.*, 188 F. Supp. 2d 986, 989 (C.D. Ill. 2002). As the circuit court recognized and PM USA demonstrated at trial (and again in post-trial proceedings regarding bonding), its net worth as of December 31, 2002 was $6.462 billion. *See* R. 11233-34 (PM USA's witness Oramas) (under seal); R. 12318-20. Thus, the $3 billion punitive damages award is approximately 50% of PM USA's net worth – an amount that is clearly excessive under Illinois law. *See, e.g., Proctor v. Davis*, 291 Ill. App. 3d 265, 287 (1st Dist. 1997) ("punishment in the amount of 2% of [defendant's] net worth is excessive in the extreme"). The gross excessiveness of this punitive award becomes all the more apparent when the $7.1 billion compensatory award is taken into account – an award that by itself would more than wipe out PM USA's entire net worth.

The court's judgment made the unfounded declaration that PM USA's "true value or worth [was] between $25 billion and $50 billion." C. 43421. That assertion has nothing to do with PM USA's net worth or ability to pay. The court's statement refers to testimony presented by plaintiffs that "based upon the market capitalization of the parent company, Altria Group, Inc.

("Altria"), the net worth would be approximately $25 billion." C. 43421. Altria, a separate company, is not a party to this case, and thus its financial capacity is irrelevant. *See Walker v. Dominick's Finer Foods, Inc.*, 92 Ill. App. 3d 645, 649-50 (1st Dist. 1980); *see also* R. 12833-34 (circuit court recognizing that Altria has no obligations to assist PM USA in satisfying the judgment). Moreover, market capitalization, even if calculated for the correct entity, has nothing to do with net worth and the ability to pay. As plaintiffs' witness Dr. Harris agreed, market capitalization is the total "value of shares owned by shareholders" or, in other words, "the value that someone else would have to pay to acquire the company." R. 12324-25. PM USA does not own its stock and thus cannot sell its stock to satisfy the judgment.

The court's judgment also declared that "a straightforward accounting calculation based upon Philip Morris USA's operating income would establish the Defendant's true net worth to be $50 billion." C. 43421. This figure, however, appears to have been pulled from thin air. The record contains no "straightforward accounting calculation" (or calculation of any kind) that produces any such figure.

In short, none of the circuit court's justifications for imposing a combined damages award that far exceeds PM USA's net worth survives scrutiny. The punitive damages award exceeds PM USA's ability to pay and should be set aside as excessive.

V. THE CIRCUIT COURT ERRONEOUSLY STRIPPED PM USA OF ITS PRIVILEGE CLAIMS AS TO CERTAIN DOCUMENTS

The circuit court ruled that PM USA had waived its privilege and work product claims with respect to approximately 39,000 documents because they were produced under threat of criminal contempt in response to a subpoena by a congressional committee and subsequently released to the public by the committee's chairman without PM USA's consent. *See* Hrg. Trans.

(11/14/02) at 120 (under seal);[42] R. 4562-65; C. 19802-20431. One of those documents was admitted into evidence here. R. 4578, 4709 (PX 67.229). As PM USA argued below, the court's ruling was erroneous because forced compliance with a congressional subpoena does not waive the attorney-client privilege or work product protection. *See, e.g.*, *United States v. De la Jara*, 973 F.2d 746, 749 (9th Cir. 1992); *see also* C. 20788-1247. Accordingly, because the ruling was in error and to avoid the possibility of a future claim of waiver, PM USA requests reversal of the circuit court's ruling on this issue.

CONCLUSION

For the reasons stated above, the judgment below should be reversed, and the circuit court should be directed to decertify the class and enter judgment in favor of PM USA.

Respectfully submitted,

Dated: December 10, 2003

One of the attorneys for Defendant-Appellant
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[42] This transcript was inadvertently excluded from the record below, and PM USA will move to add the transcript to the record.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is one of the attorneys for Defendant-Appellant Philip Morris USA Inc. and that she served the foregoing Opening Brief of Appellant Philip Morris USA Inc. and the two-volume Separate Appendix on all counsel of record by causing three copies of said Opening Brief and Separate Appendix to be sent via overnight courier for next-day delivery on December 10, 2003, addressed to:

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CERTIFICATE OF MAILING

The undersigned hereby certifies that she is one of the attorneys for Defendant-Appellant Philip Morris USA Inc. and that she caused 20 copies of the foregoing Opening Brief of Appellant Philip Morris USA Inc. and 20 copies of the two-volume Separate Appendix to be mailed to the Clerk of the Court on December 10, 2003, by depositing said copies, postage prepaid, in the United States mail at 190 South LaSalle Street, Chicago, Illinois, before the hour of 5:00 p.m., addressed to:

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